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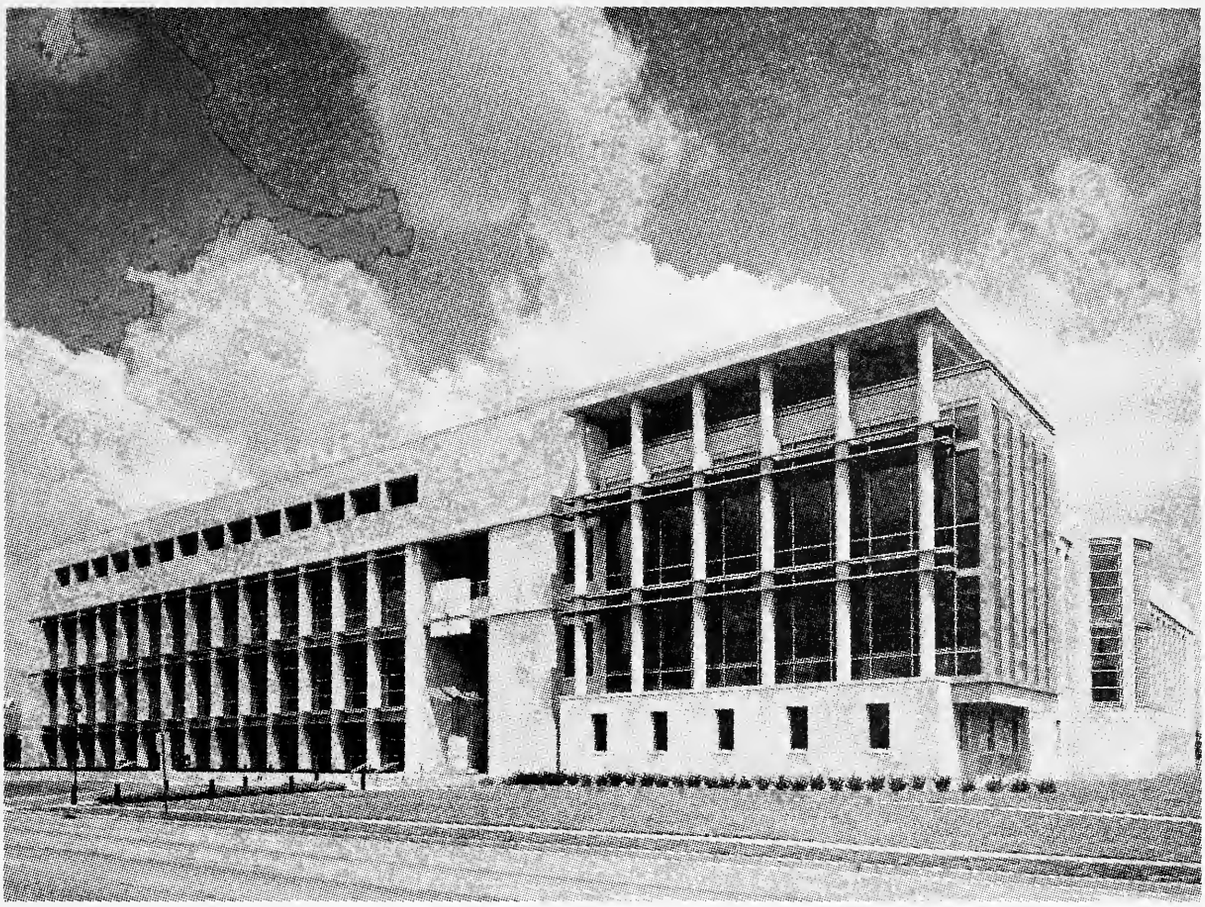

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CHIEF JUSTICE RICHARD M. GIVAN, 1921-2009

Indiana Law Review

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TRIBUTE

A TRIBUTE TO RICHARD M. GIVAN, 1921–2009 JUSTICE, INDIANA SUPREME COURT, 1969–1994 CHIEF JUSTICE OF INDIANA, 1974–1987

JUSTICE BRENT E. DICKSON*

With the recent death of Richard M. Givan,[1] Indiana has lost one its most important jurists. He was the third-longest serving Justice in Indiana Supreme Court history,[2] the second-longest serving Chief Justice,[3] and the Supreme Court's most prolific author of majority opinions in the past 130 years.[4] Noteworthy also is his transitional role when the appellate judicial selection system underwent massive constitutional revision and as the court began to substantially expand its administrative responsibilities.

Dick Givan's life was enormously rich and memorable in many ways apart from his noteworthy legal career. He was a loving and devoted husband, the father of four daughters, a stalwart of his church, the Fairfield Friends Meeting in Camby, Indiana, a mainstay of his local Lions Club, a U.S. Army Air Corps pilot during World War II, an avid Arabian show horse trainer, a photographer at the Indianapolis 500 automobile race, and a person with numerous other passions.[5] His folksy, plain-spoken, and unpretentious manner resulted in many

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* Justice, Indiana Supreme Court. B.A., 1964, Purdue University; J.D., 1968, Indiana University School of Law—Indianapolis. Justice Dickson and Chief Justice Givan served together on the Indiana Supreme Court for six years.

1. Richard M. Givan died July 21, 2009. He was born June 7, 1921.

2. Justice Givan's length of service (9,125 days) is presently exceeded by only Judge Isaac Blackford (1817–53, 12,899 days) and Justice Roger O. DeBruler (1968–96, 10,174 days).

3. Richard M. Givan's thirteen years as Chief Justice of Indiana is eclipsed only by current Chief Justice Randall T. Shepard, who is presently in his twenty-third year in the position.

4. Justice Givan's 1,571 majority opinions are surpassed only by the 1,573 majority opinions authored by Judge Samuel Perkins during his two terms in office in 1846–65 and 1877–79. Justice DeBruler authored 889 majority opinions and Judge Blackford 874. During his twenty-five years on the court, Justice Givan participated in 5,983 cases.

5. Further details may be found at JEROME L. WITHERED, HOOSIER JUSTICE: A HISTORY OF THE SUPREME COURT OF INDIANA 147-48 (1998); Jerome L. Withered, *Richard M. Givan: Justice, Indiana Supreme Court 1969-1994, Chief Justice of Indiana 1974-1987*, 30 IND. L. REV. 35 (1997) [hereinafter Withered, *Richard M. Givan*]; Greg Kuesterman, *Justice Givan Nearing End of Brilliant Legal Journey*, IND. LAW., July 13, 1994, at 6; and the Indiana Supreme Court Legal History Lecture Series, Justice Richard M. Givan, http://www.in.gov/judiciary/citc/cle/givan/index.html (last visited Nov. 9, 2009).

devoted friends and admirers from all walks of life. This tribute, however, focuses on Richard M. Givan, the ninety-sixth Justice of the Indiana Supreme Court.

Justice Givan's judicial service was richly colored by his forbearers and his own exceptionally broad legal and political experiences. He was a fourth-generation Hoosier lawyer, and both his father and great-grandfather had been Indiana trial court judges.[6] A graduate of this law school in 1951, Dick Givan's own sixteen and one half years of law practice included work as a state public defender, a Marion County deputy prosecutor, and an Indianapolis trial lawyer whose extensive jury trial experience included twenty-eight jury trials in eighteen Indiana counties outside Marion County.[7] Givan also argued more than fifty appellate cases before the Indiana Supreme Court and two cases before the U.S. Supreme Court.[8] Before becoming an Indiana Supreme Court justice and eventually the Chief Justice of Indiana, Richard Givan had already served in the other two branches of state government. He served in the executive branch from 1953 to 1964 as a Deputy Attorney General and was then elected to the Indiana House of Representatives in 1966.[9]

During his legislative service, the General Assembly gave the first of two required approvals for a comprehensive amendment to the Judicial Article of the Indiana Constitution.[10] Among other things, the amendment discarded appellate judicial selection by frequent partisan political elections in favor of a system of gubernatorial appointment following an evaluative selection process, with each appointee's retention subject to non-partisan approval votes by the electorate every ten years.[11] One of the associated revisions changed the title of Indiana Supreme Court "judge" to "justice." Before the constitutional amendment process was completed, Richard Givan was nominated at the state Republican Convention, and subsequently elected, to the position of Judge of the Indiana Supreme Court. After the adoption of the amendment, Justice Givan was

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6. His great-grandfather Noah S. Givan had been a circuit court judge in Dearborn County before 1900; his grandfather Martin J. Givan was a noted Dearborn County trial lawyer; and his father, Clinton H. Givan, an Indianapolis lawyer, served for one term (1924–28) as judge of the Marion Superior Court, Room 4.

7. Richard M. Givan, *The Fun of Being a Lawyer and a Judge*, IND. LAW., Jan. 11–24, 1995, at 5. His two U.S. Supreme Court arguments were in *Irvin v. Dowd*, 359 U.S. 394 (1959), and *Irvin v. Dowd*, 366 U.S. 717 (1961) (following remand).

8. *Id.*

9. Withered, *Richard M. Givan*, *supra* note 5, at 35.

10. Article 16 of the Indiana Constitution prescribes that constitutional amendments must be "agreed to by a majority of the members elected to each of the two houses" in each of two consecutive sessions of the General Assembly, and thereafter approved by "a majority of the electors voting" at the next general election. The comprehensive amendments to Article 7 first passed the General Assembly on March 6, 1967, and were subsequently reapproved March 10, 1969. They were ratified by Indiana voters on November 3, 1970, and became effective on July 1, 1972.

11. IND. CONST., art. VII, § 10.

repeatedly successful in seeking retention, receiving favorable state-wide voter approvals of 64.7% in 1974 and 66.1% in 1984. He and Justice Roger O. DeBruler were the only two Supreme Court judges elected under the former political election system and thereafter retained under the nomination/appointment system.

As Chief Justice, Richard Givan shepherded substantial enhancements of the court's administrative functions. During his tenure, statutory authorization was received for the creation and funding of the offices of Supreme Court Administration and State Court Administration.[12] He was also instrumental in convincing the legislature to provide new statutory authority and substantial assured funding for the Indiana Judicial Center as a Supreme Court agency, in order to provide Indiana trial judges with a valuable research function and continuing judicial education.[13] Also under his direction as Chief Justice, the court in 1986 adopted Indiana's first program for the continuing legal education of Hoosier lawyers.[14] These developments were a stark contrast to Dick Givan's law school days when he served as the court's first law clerk (serving all five judges) and as its assistant law librarian.

Dick Givan highly valued lawyers and considered them the principal audience for his written opinions. He often reminded his colleagues of the need for brevity in our opinions to minimize the burden on lawyers' time. His own opinions were characteristically short, succinct, and unencumbered by extensive legal analysis. For him, the principal task of an appellate judge was to decide cases promptly, fairly, and without unneeded expounding or pondering about the legal principles involved. Dick Givan's frugality with the written word and his plain-spoken practicality is particularly evident from his notoriously sparse use of footnotes. His 1,571 majority opinions collectively contained a total of only fourteen footnotes,[15] an average of one footnote approximately every 112 opinions, or one every 1.9 years. During an eight-year period from December 14, 1977 until January 24, 1986, he authored 500 consecutive majority opinions without using a single footnote.

Dick Givan's work ethic was legendary. He would arrive at the court early each day (after feeding his horses) and attend to his judicial duties very purposefully. I recall his advice to me shortly after my appointment to the court, encouraging me always to postpone working on my own opinions until after I completed reviewing and voting on everything submitted from my colleagues. This was his practice. And when his colleagues' proposed opinions were circulated for vote, Dick Givan was inevitably the first to respond.

Although not reluctant in conference discussions to label some legal

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12. *See* 1975 Ind. Acts 1661. The administration of the court had previously been performed by court employees since the mid-1960s. The function of the office of State Court Administration, in distinction to the office of Supreme Court Administration, focuses upon Indiana's trial courts.

13. *See* 1977 Ind. Acts 1498.

14. IND. ADMISSION AND DISCIPLINE R. 29.

15. This total excludes two opinions which, in accordance with prevailing practice, adopted and reiterated verbatim another court's appellate decision, including its footnotes.

propositions as "asinine," "absolutely ludicrous," or "egregious error," and occasionally refusing to be persuaded because "We'd look like Ned in the Third Reader," Dick Givan was at the same time unpretentious and humble. I recall one incident in September of 1992 when he wrote an internal memorandum to his colleagues recommending the denial of a petition to transfer. Even though one of his own prior opinions was cited in support of transfer, Givan described it as "my convoluted case," and pointed out that he later made a "180-degree turn"[16] and declared "even Givan cannot understand an insurance policy" and that "based on my meager understanding of insurance policies and their intent, I recommend we deny transfer in this case."

Likely a product of his extensive experience as a trial lawyer, Justice Givan spoke with high regard for the wisdom of juries and their verdicts. Not infrequently, his opinions affirmed or reinstated jury verdicts.[17] He didn't hesitate to dissent when concluding that "the majority has transcended the bounds of appellate review and has engaged in a weighing of the evidence."[18]

Having served in both the legislative and executive branches before he came to the Court, it is particularly noteworthy that in his judicial leadership and case decisions, Richard Givan was a tenacious defender of the separation of powers between each branch of government. Several of his opinions asserted the independence of the judicial branch by striking down legislation to the contrary.[19] Not only did he persistently resist legislative attempts to engage in court functions, but also he opposed judicial attempts to engage in social policy determinations that he viewed as proper for legislative decision-making. For example, in *State ex rel. Masariu v. Marion Superior Court No. 1*,[20] which issued a writ of prohibition barring prosecution of an action seeking to compel the Principal Clerk of the Indiana House of Representatives to make public certain voting records of the House, he wrote that further litigation "would amount to

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16. The case to which he was referring was *Meridian Mutual Insurance Co. v. Richie*, 540 N.E.2d 27 (Ind.), *vacated on reh'g*, 544 N.E.2d 488 (Ind. 1989).

17. *See, e.g.*, Star Bank, N.A. v. Laker, 637 N.E.2d 805 (Ind. 1994) (affirming a verdict awarding punitive damages even though actual damages to personal and real property were nominal); S&S Truck Repairs v. Mofield, 556 N.E.2d 1313 (Ind. 1990) (reinstating a plaintiff's verdict in a damage action for faulty repair of a truck); Evans v. Palmeter, 521 N.E.2d 316 (Ind. 1988) (reinstating a defense verdict in a negligence action); Williams v. Crist, 484 N.E.2d 576 (Ind. 1985) (affirming a plaintiff's verdict in a personal injury action).

18. Travelers Indem. Co. v. Armstrong, 442 N.E.2d 349, 366 (Ind. 1982) (Givan, J., dissenting).

19. *See, e.g.*, *In re* Pub. Law No. 305 & Pub. Law No. 309 of Ind. Acts of 1975, 334 N.E.2d 659 (Ind. 1975) (holding unconstitutional a statutory provision for taking judicial notice of ordinances that conflicted with procedural rules adopted by the Indiana Supreme Court); *In re* Judicial Interpretation of 1975 Sen. Enrolled Act No. 441, 332 N.E.2d 97 (Ind. 1975) (holding unconstitutional a statutory provision that would have required the Supreme Court to enact rules and administer examinations to qualify persons, including non-lawyers, for the position of county court judge).

20. 621 N.E.2d 1097, 1098 (Ind. 1993).

constitutionally impermissible judicial interference with the internal operations of the legislative branch."[21]

Justice Givan's strong sense that judicial obligation supersedes personal ideology is strikingly illustrated in his handling of capital cases. Active in his Quaker church, he was also personally opposed to the death penalty. While serving in the Indiana legislature, Dick Givan had sponsored legislation that would have abolished capital punishment in Indiana.[22] Thirty-two years later, following his retirement from the bench, he appeared before the Indiana Senate's Committee on Corrections, Criminal and Civil Procedures and testified in favor of Senate Bill 298, which again sought to abolish capital punishment in Indiana.[23] In contrast to his own deep personal convictions, Justice Givan authored sixty-five opinions in death penalty cases, each of which affirmed the death sentence. When I asked him about this apparent difference between his beliefs and his actions, he replied that his sworn judicial duty was to uphold the constitution and laws, whether he liked them or not.

In areas subject to proper judicial oversight, such as the common law, Justice Givan was not hesitant to embrace and advocate change. He concurred in several opinions abrogating outmoded common law doctrines.[24] And he authored, over a strident dissent, the Court's opinion in *Petition of Hauptly*[25] that recognized the right of a married woman to change her legal name from her husband's surname to her own maiden name. Justice Givan was also the first Indiana justice to hire an African-American lawyer to serve as his law clerk for a regular term.[26] He was

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21. *Id.*; *see, e.g.*, State v. Alcorn, 638 N.E.2d 1242, 1245 (Ind. 1994) ("We find no reason to interfere with the province of the legislature."); Ind. State Highway Comm'n v. Morris, 528 N.E.2d 468, 476 (Ind. 1988) (Givan, J., dissenting) ("This is a matter exclusively within the province of the legislature."); Ind. Dep't of Pub. Welfare v. Chair Lance Serv., Inc., 523 N.E.2d 1373, 1380 (Ind. 1988) (Givan, J., dissenting) ("Although I agree that the rationale of the majority makes a great deal of sense, I would not presume to invade the province of the legislature and change the law in this manner."); Starks v. State, 523 N.E.2d 735, 737 (Ind. 1988) (Givan, J., dissenting) ("[T]he opinion on rehearing chooses to readjust the law in this matter and from my point of view in fact invades the province of the legislature and adds a restriction to the statute by judicial fiat. If such a change is to be made, it should be made by the legislature not by this Court.").

22. Givan was one of two co-sponsors of House Bill 1145, introduced on January 13, 1967, which sought to abolish capital punishment and to replace it with life imprisonment. Indiana House Journal, 1967, Regular Session, at 84. The bill was not enacted.

23. *See* Stephen Beaver, *Death Penalty Repeal Rejected*, INDIANAPOLIS STAR, Feb. 18, 1999, at 1C. The bill was not enacted.

24. *See also* Brooks v. Robinson, 284 N.E.2d 794 (Ind. 1972) (abrogating interspousal immunity); Campbell v. State, 284 N.E.2d 733 (Ind. 1972) (abrogating sovereign immunity), *superseded by statute*, IND. CODE § 34-4-16.5-3 (2009); Troue v. Marker, 252 N.E.2d 800 (Ind. 1969) (abrogating a common law doctrine that denied a wife's cause of action for loss of consortium of her husband).

25. 312 N.E.2d 857 (Ind. 1974).

26. Howard Stevenson, who had previously worked while a law student for the Indiana Supreme Court Disciplinary Commission, was admitted to practice on October 22, 1993, and then

not hesitant to defy gender and racial discrimination and spoke with pride of his father's resistance to judicial bigotry in the 1920s.[27] Justice Givan was gratified that, when he retired, his replacement was Myra Selby, the first woman and the first African-American to serve as a justice on the Indiana Supreme Court.

Dedicated, industrious, prolific, practical, straight-forward, plain-spoken, candid, highly-principled, humble, respectful of the past but open to change, Justice Richard M. Givan is an enormous transitional presence in the history of the Indiana Supreme Court. He left an indelible impression on the State of Indiana, on its bench and bar, and on each of his colleagues.

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served a one-year term as one of Justice Givan's law clerks from November 22, 1993 to November 4, 1994. Another African-American, Charlotte Westerhaus, had previously served from May 10, 1990 to August 10, 1990 as a student law clerk for another justice.

27. Talking about the era of Ku Klux Klan influence in Indiana politics, Dick Givan recalled that, when anti-Jewish and anti-Catholic prejudice were rampant, there was a prevailing general practice in the Marion County courts that no Jewish or Catholic lawyer could appear without white Protestant co-counsel. But Givan's father, Judge Clinton Givan, who served as an elected Marion Superior Court judge, refused to go along. According to Dick Givan, because of his father's insistence on opening his court to full and unencumbered participation by Catholic and Jewish lawyers, the "kluxers" faction successfully opposed Judge Clint Givan's renomination for a successive term of office.

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ARTICLES

IT'S JUST SECURED CREDIT! THE NATURAL LAW CASE IN DEFENSE OF SOME FORMS OF SECURED CREDIT

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INTRODUCTION

For decades commercial scholars have attempted to answer the question "Why secured credit?"[1] This question encapsulates two lines of inquiry: (1) can we explain and normatively justify the priority given to secured lenders, or (2) if we cannot explain and justify the current system, what changes are necessary to conform the system of secured credit to a rational and normatively justified foundation? Despite the multiplicity of explanations and justifications advocated in academic literature for decades, no satisfactory conclusion has been reached. A consensus has not been formed either justifying secured credit or proposing significant alterations to the system. This Article identifies the reason for the inability to come to a conclusion and proposes a normative theory of secured credit. The remainder of this Introduction sets the parameters of the argument. Part I surveys the main arguments about secured credit advocated over the past few decades. Part II articulates a normative justification for secured credit rooted in the Aristotelian/Aquinian natural law theory of usury and business investment. Part III applies this natural law model to the current system of secured credit. This analysis demonstrates that the current system generally is explained and justified by the natural law theory of credit. The analysis further indicates a few aspects of the priority regime that need to be amended to better conform to that theory.

Before examining the main arguments advocated in the debate thus far, it is necessary to more precisely define the scope of the question: Why secured credit? This simple formulation of the inquiry is both too broad and too narrow in scope. It is too broad in that it asks for a single answer without distinguishing between consumer and commercial credit. The debate about secured credit must

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1. Professor Robert Scott dates the initiation of the debate to 1979. *See* Robert E. Scott, *The Truth About Secured Financing*, 82 CORNELL L. REV. 1436, 1437 (1997). For further examples of articles published on this question, see *infra* Part I.

distinguish between consumer and commercial loans. Although certain efficiency gains may be obtained by combining filing systems for consumer and commercial secured loans, the normative justification for each, as well as the priority rules that flow therefrom, are fundamentally different. Despite the generality of the claims of the articles contributed to date, these articles really address only the narrower question: "Why secured credit *for businesses*?" Some articles limit their analysis explicitly to commercial secured loans,[2] and others implicitly create that limitation by advancing arguments and examples in support of secured credit only applicable to a commercial context.[3] Part II clarifies that the normative justification for secured credit advanced in this Article applies only to secured credit in business contexts. The justification for and scope of secured credit in consumer lending must be considered in light of different principles.

The question Why secured credit? is also too narrow in the sense that it questions secured credit without first considering the question "Why credit?" Despite some scholars' calls to reconsider the first principles and assumptions of the law of secured transactions in anticipation of the major revisions to Article 9 of the Uniform Commercial Code in 1999,[4] they limited the first principles to secured credit only. Secured credit, as a subset of extensions of credit to businesses in general, can only be evaluated in light of a theory of general business credit. The natural law theory of business credit articulated in Part II presents a comprehensive normative justification for and regulation of business credit—unsecured or secured—which naturally provides answers to the question Why secured credit? These answers allow us to evaluate the current system of

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2. *See, e.g.*, Elizabeth Warren, *An Article 9 Set-Aside for Unsecured Creditors*, 51 CONSUMER FIN. L.Q. REP. 323, 323 (1997) (limiting her set-aside proposal explicitly to "commercial loans").

3. The following articles do not explicitly state that they are limiting their analysis to business loans but argue as if this were the case: Douglas G. Baird, *Security Interests Reconsidered*, 80 VA. L. REV. 2249, 2259 (1994) ("Once we view secured debt as simply one kind of investment instrument in a firm, it becomes hard to do much to alter the capital structures for which the parties bargain."); Steven L. Harris & Charles W. Mooney, Jr., *A Property-Based Theory of Security Interests: Taking Debtors' Choices Seriously*, 80 VA. L. REV. 2021, 2033 (1994) ("D's acquisition of $100 in loan proceeds that were not otherwise available could enable D to pursue new projects, buy additional inventory or more efficient equipment, employ additional workers, or otherwise behave in a way that would decrease the likelihood that D would fail and would enhance the prospects that D would become more profitable."); Lynn M. LoPucki, *The Unsecured Creditor's Bargain*, 80 VA. L. REV. 1887, 1913-14 (1994) ("The tort-first regime that I propose is grounded in the premise that whoever supplies the capital that enables a business to operate should be legally responsible for its torts, at least to the extent of the supplier's investment. Whether the capitalist should control that liability by monitoring, involving itself in management, lending only to those whom it trusts, or delegating the task to an insurance company is left to the capitalist to decide.").

4. *See* Baird, *supra* note 3, at 2249; Elizabeth Warren, *Further Reconsideration*, 80 VA. L. REV. 2303, 2303-04 (1994).

secured credit in light of this theory.

I. THE ONGOING DEBATE OVER SECURED CREDIT

This Part provides a summary of the main arguments advocated so far in the secured credit debate. This Part does not attempt to be complete in presenting every argument advanced thus far or in exploring all of their nuances. Rather, it argues that both the apologists for and critics of the existing secured credit system have failed to articulate a coherent normative justification for defending or reforming the institution. This conclusion sets the stage for expostulating such principles in Part II. This Part groups current scholarship into three categories: (1) the "Efficiency Scholars," (2) the "Bad Effects Scholars" and (3) the "Property Rights Scholars."

A. The Efficiency Scholars

The Efficiency Scholars have been attempting to justify or reform the secured credit system on the basis of the answer to the question: "Is secured credit efficient?" This debate dates from the 1979 Yale Law Journal article by Professors Jackson and Kronman.[5] Although they did not explicitly use the term "efficiency," they were effectively arguing that the institution of secured credit was efficient, and therefore, changes to the institution should be avoided, as they would decrease wealth.[6] Since Jackson and Kronman staked their claim, scholars have debated whether or not, or to what extent, secured credit is efficient.[7] One

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5. *See* Thomas H. Jackson & Anthony T. Kronman, *Secured Financing and Priorities Among Creditors*, 88 YALE L.J. 1143 (1979).

6. *Id.* at 1158-64; Homer Kripke, *Law and Economics: Measuring the Economic Efficiency of Commercial Law in a Vacuum of Fact*, 133 U. PA. L. REV. 929, 930 (1985) (stating that Jackson and Kronman "conclude that taking security is economically efficient").

7. *See generally* Barry E. Adler, *An Equity-Agency Solution to the Bankruptcy-Priority Puzzle*, 22 J. LEGAL STUD. 73 (1993); Richard L. Barnes, *The Efficiency Justification for Secured Transactions: Foxes and Soxes and Other Fanciful Stuff*, 42 U. KAN. L. REV. 13 (1993); Lucian Arye Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 YALE L.J. 857 (1996) [hereinafter Bebchuk & Fried, *The Uneasy Case*]; James W. Bowers, *Whither What Hits the Fan?: Murphy's Law, Bankruptcy Theory, and the Elementary Economics of Loss Distribution*, 26 GA. L. REV. 27, 57-68 (1991); F.H. Buckley, *The Bankruptcy Priority Puzzle*, 72 VA. L. REV. 1393 (1986); David Gray Carlson, *On the Efficiency of Secured Lending*, 80 VA. L. REV. 2179 (1994); Thomas H. Jackson & Alan Schwartz, *Vacuum of Fact or Vacuous Theory: A Reply to Professor Kripke*, 133 U. PA. L. REV. 987 (1985); Hideki Kanda & Saul Levmore, *Explaining Creditor Priorities*, 80 VA. L. REV. 2103 (1994); Kripke, *supra* note 6; Saul Levmore, *Monitors and Freeriders in Commercial and Corporate Settings*, 92 YALE L.J. 49 (1982); LoPucki, *supra* note 3; Randal C. Picker, *Security Interests, Misbehavior, and Common Pools*, 59 U. CHI. L. REV. 645 (1992); Steven L. Schwarcz, *The Easy Case for the Priority of Secured Claims in Bankruptcy*, 47 DUKE L.J. 425 (1997); Alan Schwartz, *Security Interests and Bankruptcy Priorities: A Review of Current Theories*, 10 J. LEGAL STUD. 1 (1981); Alan Schwartz, *The Continuing Puzzle of Secured Debt*, 37 VAND. L. REV. 1051 (1984); Robert E. Scott, *A*

branch of the Efficiency Scholars embarking from the Modigliani-Miller Irrelevance Hypothesis[8] contends that the presence of secured debt may represent a zero-sum game where interest rate savings for issuing secured debt are offset by corresponding interest rate increases for unsecured debt.[9] Another line argues that security is efficient because it allows for the extension of more credit to businesses than otherwise would be available only on an unsecured basis.[10] Many scholars believe that even if lower interest rates for secured credit are offset by unsecured credit, the institution of security provides other economic benefits such as: (1) cost-efficient necessary monitoring of debtors,[11] (2) providing a lower cost method for achieving what could otherwise be contracted by the secured party and its debtor,[12] (3) lower cost provision of additional financial planning and consulting benefits,[13] (4) policing of inefficient asset

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Relational Theory of Secured Financing, 86 COLUM. L. REV. 901 (1986); Paul M. Shupack, *Solving the Puzzle of Secured Transactions*, 41 RUTGERS L. REV. 1067, 1118 (1989); George G. Triantis, *Secured Debt Under Conditions of Imperfect Information*, 21 J. LEGAL STUD. 225 (1992); James J. White, *Efficiency Justifications for Personal Property Security*, 37 VAND. L. REV. 473 (1984).

8. Franco Modigliani & Merton H. Miller, *The Cost of Capital, Corporation Finance and the Theory of Investment*, 48 AM. ECON. REV. 261 (1958) (arguing in general that given various assumptions, the choice of capital structure (debt versus equity) is irrelevant and does not affect the value or returns of the firm).

9. *See* Kanda & Levmore, *supra* note 7, at 2104 ("Reductions in interest costs obtained from creditors who expect priority must be offset by increased charges from those who can see they will be in a subordinate position."); Schwarcz, *supra* note 7, at 429 (summarizing the zero-sum game argument).

10. *See* JAMES C. VAN HORNE, FINANCIAL MANAGEMENT AND POLICY 536 (3d ed. 1974) (noting that in regard to firms that pose a significant risk of default, lenders often "require security so as to reduce their risk of loss"); Kripke, *supra* note 6, at 941.

11. *See, e.g.*, Jackson & Kronman, *supra* note 5, at 1149-61. Jackson and Kronman state:

> Consequently, the monitoring required to prevent the debtor from increasing the riskiness of a secured loan is likely to be significantly less than that required when the loan is unsecured. A secured creditor can focus his attention on the continued availability of his collateral and is largely free to disregard what the debtor does with the remainder of his estate. By restricting his attention in this way, the secured creditor can reduce the number and complexity of his monitoring tasks and thus achieve a substantial savings in monitoring costs.

Id. at 1153; *see also* Saul Levmore, *Monitors and Freeriders in Commercial and Corporate Settings*, 92 YALE L.J. 49, 55-57 (1982). *But see* Lucian Arye Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy: Further Thoughts and a Reply to Critics*, 82 CORNELL L. REV. 1279, 1315-18 (1997) [hereinafter Bebchuk & Fried, *Reply to Critics*] (arguing that security interests may actually inefficiently decrease monitoring).

12. *See, e.g.*, Jackson & Kronman, *supra* note 5, at 1157 ("These transaction costs can be avoided by allowing the debtor himself to prefer one creditor over another. The rule permitting debtors to encumber their assets by private agreement is therefore justifiable as a cost-saving device that makes it easier and cheaper for the debtor's creditors to do what they would do in any case.").

13. *See, e.g.*, Scott, *supra* note 7, at 913 ("The external benefits of this financing arrangement

wasting in failed bankruptcy reorganizations,[14] (5) protecting against asset substitution transactions and other debtor misbehavior,[15] and (6) reducing of credit screening costs.[16]

Without entering into a detailed discussion of the merits of these arguments, one can reach the conclusion that a comprehensive justification of secured commercial credit on efficiency grounds is unproven and perhaps not provable. This question of efficiency is just as open as it was in 1979, despite some refining of positions, and that testifies to the fact that the efficiency justification stands on shaky ground. A comment by David Carlson aptly summarizes this failure of efficiency arguments to reach a comprehensive conclusion: "[S]ecured lending is not necessarily inconsistent with economic efficiency, though whether any given security interest is efficient is highly contingent and probably unknowable."[17]

Assuming for the moment that it could one day be proven that the institution of security provides efficiency benefits, this conclusion would not normatively justify the existing legal regime. As Aristotle claimed millennia ago, economic efficiency is not the end of human existence or political society.[18] Proof of economic efficiency merely tells us one of the effects of a given course of action;

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derive from the valuable financial planning and coordination provided by the creditor. The financial inputs are a 'public good' that will not be provided unless the creditor can structure the relationship so as to capture a share of the returns from the venture [which necessitates the grant of security].").

14. *See, e.g.*, White, *supra* note 7, at 488-89 ("Without exception, one can assume that the unsuccessful reorganization attempt will have dissipated some of the assets that might otherwise have been distributed to creditors had liquidation occurred upon default.").

15. *See, e.g.*, Carlson, *supra* note 7, at 2213 ("Instead, we can assert very simply that security interests disable the borrower from personal misbehavior by preventing or at least inhibiting transfers by the borrower to third parties. As a result, the risk of such misbehavior is effectively destroyed in part or in whole . . . ."); Jackson & Kronman, *supra* note 5, at 1153 ("But so long as the particular items of property securing his loan remain intact, a creditor will be immunized from the effects of his debtor's misbehavior."); Schwarcz, *supra* note 7, at 11; Scott, *supra* note 7, at 909-11 (summarizing the argument that security deters debtor misbehavior).

16. *See, e.g.*, Buckley, *supra* note 7, at 1469.

17. Carlson, *supra* note 7, at 2213; *see also* Ronald J. Mann, *Explaining the Pattern of Secured Credit*, 110 HARV. L. REV. 625, 682 (1997) ("Secured credit is an area in which broad conclusions are likely to be incorrect: suppliers do not always lend on an unsecured basis, and large companies do not always borrow unsecured. To make a serious effort to describe the richness of the real pattern, a theory must not only acknowledge, but embrace, the variety of the circumstances in which parties make lending decisions. This conclusion may frustrate those who search for a single unifying theory for credit decisions.").

18. ST. THOMAS AQUINAS, COMMENTARY ON ARISTOTLE'S NICHOMACHEAN ETHICS 7 (C.I. Litzinger trans., Henry Regnery Co. 1964) (1993) ("Hence we see that the noblest of the operative arts, for example, strategy, domestic economy, and rhetoric fall under political science." (quoting ARISTOTLE, NICHOMACHEAN ETHICS II, 1094a28-1094b3)).

it does not tell us normatively if such a thing should be done.[19] For example, even if it could be proven that the economy would be more efficient if ninety-five percent of the population were eliminated, such a conclusion would clearly not tell us that such an act of genocide should occur. All other normative issues being equal, efficiency may be a reason for selecting one legitimate option in lieu of another, but it cannot be *the* normative reason for all decisions.

B. The Bad Effects Scholars

The Bad Effects Scholars have argued that even if purported net efficiency gains really exist, they may come at the expense of other people who deal with particular insolvent debtors. Several Bad Effects Scholars argue that many of these persons, (e.g., tort victims and environmental cleanup funds) involuntarily become creditors to the debtor, and their ability to recover for losses inflicted by the debtor on them is adversely impacted by the presence of security.[20] The argument has even been extended to parties who voluntarily deal with the debtor, but who are unable to adjust their relationship when security interests are later created.[21] Although these arguments have an aura of normative overtones, they are often merely another variation of the efficiency debate. The language of these normatively cloaked efficiency arguments is often couched in the terminology of efficiency, using phrases such as "[s]ecurity tends to misallocate resources"[22] and "whether those costs should be internalized to the operation of a business."[23] Some of this debate merely takes a wider view of efficiency that requires more externalities to be taken into account in computing net efficiency. However, two arguments employed by the Bad Effects Scholars appear to transcend the efficiency debate: (1) consent theory and (2) distributive justice.

Lynn LoPucki critiques the current secured credit institution because it permits the rights of certain involuntary creditors to be affected without their actual or meaningful consent.[24] Bebchuk and Fried argue that full priority violates the principle that creditors should not be subordinated in payment without their consent, and this is exactly what happens to non-adjusting creditors.[25] Yet, consent is not an absolute normative value in all cases. People

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19. *See* Elizabeth Warren, *Making Policy with Imperfect Information: The Article 9 Full Priority Debates*, 82 CORNELL L. REV. 1373, 1377 (1997) ("Economists are, however, the first to note that using economic analysis as a tool for understanding policy choices has its limits.").

20. *See, e.g.*, John Hudson, *The Case Against Secured Lending*, 15 INT'L REV. L. & ECON. 47 (1995); LoPucki, *supra* note 3, at 1896-1902; Warren, *supra* note 19, at 1389.

21. *See* Bebchuk & Fried, *Reply to Critics*, *supra* note 11, at 1295 (using the term "non adjusting creditors" to refer to this larger group of uncompensated creditors); Bebchuk & Fried, *The Uneasy Case*, *supra* note 7, at 882.

22. LoPucki, *supra* note 3, at 1891.

23. Warren, *supra* note 19, at 1388.

24. LoPucki, *supra* note 3, at 1891 ("[I]mposing on unsecured creditors a bargain to which many, if not most, of them have given no meaningful consent.").

25. *See* Bebchuk & Fried, *Reply to Critics*, *supra* note 11, at 1285 ("[N]otwithstanding its

do not have the general right to consent to every action of another person that has an effect on them.[26] A supplier may sell inventory on credit, and the buyer may sell the inventory and use the proceeds to pay an electric bill rather than paying the supplier. Such a use of proceeds diverts resources from paying the supplier. Not even LoPucki would argue that a principle of justice has been violated simply because the supplier has not consented. The consent argument has not thus far clearly articulated why particular involuntary or non-adjusting creditors are entitled to the consent claimed for them.

Elizabeth Warren has argued that the current preference for secured creditors redistributes wealth from involuntary to voluntary creditors by allowing security interests to be granted.[27] The difficulty with Warren's argument is that distributive justice only requires that all individuals in a group receive distributions consistently with the principle of distribution adopted ex ante.[28] Warren does not clearly articulate what principle of distribution should be operative in commercial contexts. Even assuming a particular principle of distribution (*X*) is adopted, Warren then needs to demonstrate why treating

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long history, full priority is actually inconsistent with an important general principle of commercial law: that a borrower may not subordinate one creditor's claim to that of another without the consent of the subordinated creditor.").

26. Harris and Mooney give the example of a solvent debtor making payments to one creditor, reducing resources his available to pay the second creditor. They point out that neither fraudulent transfer law nor critics like Carlson call for the invalidation of such payments because they affect other creditors without their consent. *See* Harris & Mooney, *supra* note 3, at 2037-39 & n.47 (citing David G. Carlson, *Accident and Priority Under Article 9 of the Uniform Commercial Code*, 71 MINN. L. REV. 207, 245-46 (1986)).

27. Warren, *supra* note 19, at 1389-91.

28. *See* AQUINAS, *supra* note 18, at 293 ("Moreover, this is clear from the fact that bestowal should be made according to merit, for the just thing in distribution has to be done according to a certain merit. But all do not agree that merit consists in the same thing." (quoting ARISTOTLE, NICHOMACHEAN ETHICS IV, 1131a24-29)); ST. THOMAS AQUINAS, SUMMA THEOLOGICA, at II-II Q.61 A.2 (Fathers of the English Dominican Province trans., Benzinger Brothers, Inc. 1947) ("[I]n distributive justice something is given to a private individual, in so far as what belongs to the whole is due to the part, and in a quantity that is proportionate to the importance of the position of that part in respect of the whole. Consequently in distributive justice a person receives all the more of the common goods, according as he holds a more prominent position in the community. This prominence in an aristocratic community is gauged according to virtue, in an oligarchy according to wealth, in a democracy according to liberty, and in various ways according to various forms of community. Hence in distributive justice the mean is observed, not according to equality between thing and thing, but according to proportion between things and persons: in such a way that even as one person surpasses another, so that which is given to one person surpasses that which is allotted to another. Hence the Philosopher says that the mean in the latter case follows *geometrical proportion*, wherein equality depends not on quantity but on proportion. For example we say that 6 is to 4 as 3 is to 2, because in either case the proportion equals 1-1/2; since the greater number is the sum of the lesser plus its half: whereas the equality of excess is not one of quantity, because 6 exceeds 4 by 2, while 3 exceeds 2 by 1.") (citation omitted).

secured and unsecured creditors differently is inconsistent with principle *X*. If secured and unsecured creditors are different types of individuals, it is not necessarily inconsistent with distributive justice for them to receive different treatment as long as their distributions retain the same proportionality determined for their respective groups. Although Warren argues that the treatment of secured creditors in bankruptcy violates the principle of distributing burdens and losses pro rata, the preference for secured creditors violates distributive justice only if the principle of distribution adopted is that all creditors, regardless of their secured status, should receive distributions proportionate to their debt. On the other hand, if a different principle of distribution is adopted that makes a distinction between secured and unsecured creditors and requires distributions to be proportional both to debt and value of security securing that debt then distributive justice has not been violated. Again, those advancing this argument need to articulate and defend a principle of distribution and then see if the Bankruptcy Code and Article 9 effect a different proportionate distribution.

Beyond this preliminary difficulty, the actual arguments Warren advances are merely consent and efficiency arguments in a different guise. She argues that it is unjust to redistribute wealth from involuntary creditors to voluntary creditors without their consent.[29] Bankruptcy primarily concerns the ability of the state to redistribute resources without consent.[30] Although the image of an uncompensated tort victim may sympathetically appeal to our emotion of compassion, Warren has not clearly articulated a jurisprudential argument why this redistribution of resources violates a principle of justice, and if it does, which one. Her second argument is one of efficiency in another guise. Secured creditors with priority may be able to use their preferred status to block otherwise economically beneficial reorganizations.[31] Thus, both of these arguments are really another instance of the consent and efficiency lines of reasoning.

Yet, as Harris and Mooney point out,[32] most Bad Effects Scholars appear only to present criticisms of specific results of the current system, which appear

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29. *See* Warren, *supra* note 19, at 1389 ("To the extent that the rules create any redistribution among creditors of a failing business, the system directs resources away from creditors who are involuntary, underrepresented, and least able to spread their losses. Instead, value is directed toward lenders who are entirely voluntary, best able to protect their rights, and best able to spread their risks among numerous projects.").

30. *See e.g.*, 11 U.S.C. § 1126(f) (2006) (allowing for "cramdown" of a plan, approval of a plan without the consent of the particular creditor).

31. *See* Warren, *supra* note 19, at 1390 ("Notwithstanding the features of bankruptcy that curtail the power of the secured creditor, the ability of the secured creditor to demand adequate protection and to insist on a priority repayment of assets effectively gives the secured creditor the power to block a reorganization.").

32. *See* Harris & Mooney, *supra* note 3, at 2046-47 ("Given that security interests will not be abolished, the [Bad Effects Scholars] should come forward with a principled basis for casting a cloud of doubt or suspicion about security interests generally. If they really wish to argue that the creation of security interests should be more difficult, time consuming, expensive, and risky, then they must explain why.").

undesirable from their point of view. Because the Bad Effects Scholars have not suggested the complete elimination of a system of secured credit, they must accept that some form of system should exist. They need to clearly articulate a coherent justification for and understanding of a secured credit system that can be used to demonstrate why the currently enacted system varies from such a model.

C. The Property Rights Scholars

The Property Rights Scholars appear to articulate a normative justification for the current system of secured credit.[33] After disputing the assertions that secured credit is necessarily inefficient and harmfully redistributive, Harris and Mooney argue that the normative values of property rights and freedom of contract justify the current system of secured credit.[34] They offer the following definition of the nature of property rights that justify secured credit:

> (i) the right to use an asset (*usus*), (ii) the right to capture benefits from that asset (*usus fructus*), (iii) the right to change its form and substance (*abusus*), and (iv) the right to transfer all or some of the rights specified under (i), (ii), and (iii) to others at a mutually agreed upon price. Implicit in these elements is an owner's right to exclude others from exercising ownership rights over the owner's property.[35]

Harris and Mooney do not present a detailed justification for private property and freedom of contract on the assumption that most people would agree that these principles are normatively justifiable.[36] They list a few general values that they assume most people would agree are connected with the institution of private property and freedom of contract, such as "the promotion of economic efficiency, the enhancement of political freedom and liberty, the contribution to an owner's sense of 'self,' and the encouragement of innovation" and "respect for the autonomy of . . . persons."[37] Yet, even Harris and Mooney concede that, notwithstanding near unanimous agreement that private property and freedom of contract are normatively justifiable, these general concepts do not represent absolute rights and norms incapable of some legal circumscription.[38] As every

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33. *See id.* at 2047 ("Our *normative* theory of security interests is grounded upon the *normative* theories that justify the institution of private property." (emphasis added)).

34. *Id.* at 2042-49.

35. *Id.* at 2048 (quotations and footnote omitted).

36. *See id.* at 2050-51 ("We embrace the baseline principles that underlie current law insofar as it generally respects the free and effective alienation of property rights and the ability of parties to enter into enforceable contracts. We believe that these principles reflect widely shared normative views that favor party autonomy concerning both property and contract. We need not undertake, here, a defense of these principles. Instead, we accept them as sound . . . .").

37. *Id.* at 2048-49 (footnotes omitted).

38. *See id.* at 2049-50 ("Nevertheless, some restrictions on alienability actually may promote efficiency. . . . And some restraints [on alienability] may be warranted on normative grounds

first year law student learns, each of the four elements in Harris and Mooney's definition of property is limited to some extent by jurisprudential principles other than property (contracts, torts, environmental law, constitutional law, criminal law).[39] Likewise, principles such as capacity, duress, misrepresentation, and unconscionability limit the enforceability of specific exercises of freedom of contract.[40] Put another way, property and contract rights are normatively justifiable in general, yet the specific implications of any particular exercise of them will vary when they intersect with other normative and jurisprudential principles applicable to that context. For example, the freedom to use one's property as one chooses is, as a general proposition, accepted. Yet, one's exercise of this right is curtailed when the use involves a crime (e.g. using a car to speed).

The recognition and enforcement of security interests are, as Harris and Mooney claim, a form of property and contract rights. Yet, these rights intersect with the extension of credit to business ventures. Thus, to apply property and contract principles in the context of secured credit requires the understanding of the normative principles underlying business credit because these principles may affect the way in which this particular form of property and contracts rights are regulated. Part II turns to the development of this theory of business credit.

II. THE NATURAL LAW THEORY OF BUSINESS CREDIT

To understand the nature of the property and contract rights created when a business loan is secured, this Article examines the scholastic theory of credit, which is rooted in economic natural law. This Part traces the theory explaining the norms of commutative justice that define and limit the extension of business credit so that these norms can be applied in Part III to the legal institution of security.

The scholastic theory of credit is rooted in a fundamental distinction between the investment of capital in a business venture or wealth-producing assets and the lending of money to fund consumption.[41] This distinction leads to a different system of principles governing the relationships between investor and investee on one hand and consumer lender and borrower on the other. The natural law

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unrelated to economic efficiency. . . . Yet this 'freedom of contract' abstraction that so dominated classical contract law doubtless does not and never did exist in a pure form in the real world. Although the central attribute of an enforceable contract is the right of a party to call upon the state's coercive power to provide a remedy, examples abound both of contracts that the courts will not enforce and of challenges to the theoretical bases for contract law.").

39. *See* John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1281 (1996).

40. *See* FARNSWORTH, CONTRACTS 225-73, 307-16 (Aspen 3d ed. 1999).

41. *See, e.g.*, Peter John Olivi, *On Usury and Credit*, *in* 4 READINGS IN WESTERN CIVILIZATION: MEDIEVAL EUROPE 318, 318 (1986) (distinguishing between handing over money to someone "to be spent on his own personal needs" and to an "average merchant engaged in legitimate enterprise").

usury theory concludes that someone who lends money for the purpose of consumption should be entitled to compensation for loss incurred in making the loan (interest in the original Roman law meaning of the word).[42] The charging of a gain above the amount loaned, plus any cost of reimbursement,[43] constitutes usury and is unjust.[44]

This conclusion is rooted in the distinction between money and capital. Natural law theorists defined money essentially in the same way as modern commercial law. Money is an "instrument artificially invented [by the State] for the easier exchange of natural riches" and a balancing "instrument for the exchange of natural riches."[45] Money thus has two interconnected uses: It can measure the value of something and hence facilitate exchange transactions, and it can store value for future use.[46] Money is important to society because it is essential to facilitate necessary exchange transactions.[47] As simple bartering between individuals is too limited to supply all human needs, money facilitates a broader range of exchange by providing a method of measuring value in multiple exchanges occurring across time and space.[48] A farmer can exchange

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42. *See* Brian M. McCall, *Unprofitable Lending: Modern Credit Regulation and the Lost Theory of Usury*, 30 CARDOZO L. REV. 549, 590-93, 601-02 (2008).

43. Historically there were many debates about what constituted costs capable of reimbursement by interest payments and the appropriate method of calculating loss. The nuances of this history and its ultimate resolution are not directly relevant to the topic of this Article as its argument assumes the presence of a business investment, not a consumer loan. *See id.* at 570-71, 590-93.

44. BENEDICT XIV, VIX PERVENIT (1745), *reprinted in* THE PAPAL ENCYCLICALS, 1740-1878, at 15-16 (Claudia Carlen ed., Pierian Press 1990), *available at* http://www.ewtn.com/library/ENCYC/B14VIXPE.HTM ("The nature of . . . usury has its proper place and origin in a loan contract. This financial contract between consenting parties demands, by its very nature, that one return to another only as much as he has received. . . . [A]ny gain which exceeds the amount [the lender] gave is illicit and usurious.").

45. NICHOLAS ORESME, THE DE MONETA OF NICHOLAS ORESME AND ENGLISH MINT DOCUMENTS 4-5 (Charles Johnson ed. and trans., 1956); *see* DIANA WOOD, MEDIEVAL ECONOMIC THOUGHT 70 (2002). *Cf.* U.C.C. § 1-201(b)(24) (amended 1990) (defining money in almost identical terms).

46. *See* GRATIAN, DECRETUM D.88, c.11 [hereinafter GRATIAN, DECRETUM] (noting that money is meant for no purpose other than to buy something (*quoniam pecunia non ad aliquem usum disposita est nisi ad emendum*) but noting that money could be stored up (*pecunia reposita*) for future use).

47. AQUINAS, *supra* note 18, at 307, 310.

48. Aristotle used the example of shoes and a home. In a direct exchange, the shoemaker would have to transfer as many shoes as equal the value of a house. Because the house builder will not have need for so many shoes, money allows the two to achieve an exchange of a house or a pair of shoes for money, which represents the equivalent value. This money can then be exchanged with others for required goods. *Id.*; WOOD, *supra* note 45, at 71-73 ("[M]oney, when authorized by the State, overcame the difficulties of barter by providing a uniform measure." (citing the Roman jurist Paul)).

his crops for money, which can then be exchanged with a clothes maker, shoemaker, and doctor for other goods and services. Thus, the primary function of money is to be used in exchange transactions. Because exchanges are not simultaneous,[49] the secondary purpose of money is to store value for future use.[50] To use the prior example, the farmer may keep some of the money he received from his crops until he needs a pair of shoes.

Once money is seen as a mere instrumentality either to effect present exchange transactions or to store value for future ones, it can only be normatively evaluated in the context of a particular use.[51] As Aquinas says:

> All other things from themselves have some utility; not so, however, money. But it is the measure of utility of other things . . . . And therefore the use of money does not have the measure of its utility from this money itself, but from the things which are measured by money according to the different persons who exchange money for goods.[52]

In other words, because money can only be used to trade for other things (now or in the future) its use cannot be evaluated normatively in isolation but only in the context of a particular exchange. Money can be exchanged either for an interest in something productive (which produces some additional wealth) or something which is non-productive (something that can be used or consumed but which use does not produce additional wealth). This Article maintains the distinction by referring to money when it is exchanged for an interest in something productive as capital and by referring to it merely as money when it is not so used.

With this definition of money established, the two main arguments supporting the scholastic limitation on profit from a loan of money can be summarized. They are rooted in both commutative and distributive justice. Charging more than the amount loaned (plus any compensation for loss) is a violation of commutative justice which requires equality in voluntary exchange transactions. Aristotle argued that commutative justice[53] required equality in all

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49. JUSTINIAN, DIGEST 18:1:1 ("The coincidence was not always readily found, that when you had what I wanted I had what you were willing to give.").

50. *See* AQUINAS, *supra* note 18, at 311 ("For future exchanges money is as it were a guarantee that a man, who has no present need, will be helped when he is in want later on." (quoting ARISTOTLE, NICHOMACHEAN ETHICS IX, 1133b10-14)).

51. *See* GRATIAN, DECRETUM, *supra* note 46, at D.88, c.11 (articulating that from money which is not being exchanged and merely storing value, one takes no use—*ex pecunia reposita nullum usum capis*).

52. JOHN T. NOONAN, JR., THE SCHOLASTIC ANALYSIS OF USURY 52 (1957) (translating and quoting ST. THOMAS AQUINAS, IV LIB. SENT. III:37:1:6).

53. Two quotations from St. Thomas Aquinas can serve as a definition of commutative justice. "In the first place there is the order of one part to another, to which corresponds the order of one private individual to another. This order is directed by commutative justice, which is concerned about the mutual dealings between two persons." AQUINAS, *supra* note 28, at 1452.

> [I]n commutations something is paid to an individual on account of something of his

exchange transactions between individuals in society.[54] The principle of equality in exchange held that particular transactions between individuals—voluntary or involuntary—were not a principled method to achieve redistribution. James Gordley explained that equality in exchange is not meant to achieve a just distribution of wealth in and of itself, the achievement of which involves principles of distributive, not commutative, justice.[55] Rather, the equality in exchange is meant to avoid "random redistributions" of wealth through the system of exchange.[56] When someone borrows money for consumption, its value equates to the value of the thing whose consumption was procured with the borrowed money. As the thing consumed does not increase in wealth by being consumed, the value of the borrowed money likewise does not increase. To charge a profit in addition to the return of the money lent, plus compensation for any actual loss occasioned thereby, is, therefore, an unjust exchange.

The injustice of charging a profit on a loan of money can also be demonstrated by the distinction between ownership and use. The lender who merely provides money, as opposed to capital, charges both for the ownership of the money itself (in requiring the return of the same amount of money) and for its use (the usury or additional gain charged).[57] To charge for the ownership and use of something which is consumed in use is to charge twice for the same thing.[58] Put another way, the usurer exchanges his money for a right to receive

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> that has been received, as may be seen chiefly in selling and buying, where the notion of commutation is found primarily. Hence it is necessary to equalize thing with thing, so that the one person should pay back to the other just so much as he has become richer out of that which belonged to the other.

Id. at 1453. *See* Jacques Melitz, *Some Further Reassessment of the Scholastic Doctrine of Usury*, 24 KYKLOS INT'L REV. FOR SOC. SERVICES 473, 476 (1971) ("[T]he usury doctrine, dating mainly from 1150-1350, appeals not to authority and charity, but to 'natural law', therefore to reason and commutative justice.").

54. AQUINAS, *supra* note 18, at 300 (citing ARISTOTLE, NICHOMACHEAN ETHICS VI, 1131b32-1132a7).

55. *See* James Gordley, *Equality in Exchange*, 69 CAL. L. REV. 1587, 1587-88 (1981).

56. *See id.* at 1616-17. This equality in exchange does not mean that one party cannot use the thing received in exchange to make a profit, but that use is not a gain from the exchange itself.

57. GRATIAN, DECRETUM, *supra* note 46, at D.88, c.11 ("Unde super omnes mercatores plus maledictus est usurarius; ipse namque rem datam a Deo uendit, non conparatam, ut mercator, et post fenus rem suam repetit, tollens aliena cum suis, mercator autem non repetit rem uenditam." ("Over all merchants, the most accursed is the usurer, for he sells a thing given by God, not bought as a merchant; and after the usury he reseeks his own good, taking back his own good and the good of the other. A merchant, however, does not reseek the good he has sold.") (author's translation)).

58. AQUINAS, *supra* note 28, at 1518 ("To take usury for money lent is unjust in itself, because this is to sell what does not exist, and this evidently leads to inequality which is contrary to justice. In order to make this evident, we must observe that there are certain things the use of which consists in their consumption: thus we consume wine when we use it for drink, and we consume wheat when we use it for food. Wherefore in such like things the use of the thing must not be reckoned apart from the thing itself, and whoever is granted the use of the thing, is granted

the same amount back and to charge a profit in addition is to demand an unequal exchange.[59] This prohibition on charging for use does not apply to the lending of a durable good that can be used without consuming it. In such a case, one transfers the right to use the thing without the right to own or dispose of it, such as renting a house.[60] However, because money's only use is to exchange it for something else,[61] thereby consuming it, one cannot use it (exchange it for something) without having the right to transfer it (ownership). In contrast, someone can use a house (live in it) without owning it.

In addition to violating principles of commutative justice, the charging of usury involves undesirable redistributions of wealth. Allowing the charging of usury for a consumptive loan establishes a principle of distribution based on surplus and need. Those in need (the borrowers) redistribute their future wealth to those with excess wealth (the lender).[62] The charging of usury—gain on a loan—results in individual injustice due to an inequitable exchange and societal redistribution of wealth. The borrower at usury transfers a portion of his future wealth to the usurer for current consumption. The society suffers as usury diverts investment away from productive activities, such as farming, because the wealthy invest their money in usurious loans where the money is put to non-productive uses.[63]

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the thing itself; and for this reason, to lend things of this kind is to transfer the ownership. Accordingly if a man wanted to sell wine separately from the use of the wine, he would be selling the same thing twice, or he would be selling what does not exist, wherefore he would evidently commit a sin of injustice. In like manner he commits an injustice who lends wine or wheat, and asks for double payment, viz. one, the return of the thing in equal measure, the other, the price of the use, which is called usury.").

59. The theory permits a lender to ask for reimbursement of actual or estimated losses caused by the transaction, but to recover these is not to charge a profit because they are limited to compensation for loss. *See supra* notes 41-44 and accompanying text.

60. *See* GRATIAN, DECRETUM, *supra* note 46, at D.88, c.11 (distinguishing charging for the use of a field or house from the lending of money: "[a]dhuc dicit aliquis: Qui agrum locat, ut agrariam recipiat, aut domum, ut pensiones recipiat, nonne est similis ei, qui pecuniam dat ad usuram? Absit. Primum quidem, quoniam pecunia non ad aliquem usum disposita est, nisi ad emendum; secundo, quoniam agrum habens, arando accipit ex eo fructum, habens domum, usum mansionis capit ex ea. Ideo qui locat agrum uel domum, suum usum dare uidetur, et pecuniam accipere, et quodammodo quasi commutare uidetur cum lucro lucrum . . .") (footnotes omitted).

61. Even if money is considered as a store of value, the ultimate purpose of storing value would be to use it later. In any event, it seems illogical to borrow money to store value—not using it—only to return it later.

62. *See* NOONAN, *supra* note 52, at 73-74 (summarizing the arguments of St. Bernadine of Sienna, refuting the claim that despite such harmful redistributive effects some people need to borrow at usury, by stating that no person needs to borrow at usury because it only makes the needy worse off in that they now need to return the money leant plus the additional amount of usury, which payment only exacerbates their poverty by transferring what little future wealth they may earn to the usurer).

63. INNOCENT IV, COMMENTARIA APPARATUS IN V LIBROS DECRETALIUM 516-17, *De Usura*,

The same objections to contracting for a profit do not apply to a transaction not involving a loan of money.[64] When someone exchanges money for the right to receive an interest in future profits generated from the productive use of it, this exchange of money is transformed from a loan of money into an investment of capital. As the invested capital is exchanged for something capable of producing additional wealth, the capital can be valued in excess of its original invested value. John Maynard Keynes, in re-evaluating the scholastic theory of usury and capital, restated this conclusion in modern economic terminology:

> I was brought up to believe that the attitude of the Medieval Church to the rate of interest was inherently absurd, and that the subtle discussions aimed at distinguishing the return on money-loans from the return to active investment were merely jesuitical attempts to find a practical escape from a foolish theory. But I now read these discussions as an honest intellectual effort to keep separate what the classical theory has inextricably confused together, namely, the rate of interest and the marginal efficiency of capital.[65]

Likewise, Henry Somerville explained:

> Now the Canonists never quarrelled with payments for the use of capital, they raised no objection to true profit, the reward of risk, ability and enterprise, but they disputed the identification of the lending of money with the investment of capital and denied the justice of interest as a reward for saving [merely storing up value] without investment.
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> . . .
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> The Canonist principle was that sharing in trade risks made an investor a partner, a co-owner of capital, not simply a moneylender, and gave a title to profit.[66]

The use to which the invested money is meant to be put is what transforms money into capital. For it is not money which produces gain in a business but the use to which the money, now transformed into capital, is put that creates profit.[67]

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ante *caput.1* (discussing some harmful effects of usury).

64. *See* BENEDICT XIV, *supra* note 44, at 3, III ("Nor is it denied that it is very often possible for someone, by means of contracts differing entirely from loans, to spend and invest money legitimately either to provide oneself with an annual income or to engage in legitimate trade and business. From these types of contracts honest gain may be made.").

65. JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY 351-52 (Harcourt, Brace & World 1964) (1936).

66. H. Somerville, *Interest and Usury in a New Light*, 41 ECON. J. 646, 648 (1931).

67. NOONAN, *supra* note 52, at 111 (in discussing whether a usurer must restore not only the usury charged but any additional profit the usurer was able to make using the money received as usury, he comments on the relation of money to making profit thus: "The money . . . is not related as a root to the profit which is made from it, but only as matter. For a root has to some degree the

Because the investor of capital is merely requesting a share of the profits he assisted in creating, he is not charging for the loan of money, which is merely acting for him as a store of value. As money can only be valued in the context of its use, the natural law theory of usury evaluates the use of money as money in one way but the use of money as capital in another. The former produces no new wealth, whereas the latter does.

Much of the work of natural law scholars over the centuries was dedicated to discerning the characteristics which enabled one to distinguish the substance, as opposed to the mere form or nomenclature, of an investment of capital—payment of money in exchange for an interest in a business venture or productive asset—from a mere loan of money.[68] By examining the analysis of particular transactions under the scholastic usury theory, which were found to be licit business investments, it is possible to develop normative principles justifying the receipt of profit from a business investment. From these principles, a theory of just returns from business investments can be developed. Because security can be a characteristic of both money loans and capital investment, the way in which it is used in the transaction is a relevant factor to distinguish a usurious money loan from a capital investment. Security interests with certain characteristics and priorities could be inconsistent with a capital investment. To evaluate the effect a characteristic of a security interest has on the substance of a transaction, as either a money loan or capital investment, one must delve more deeply into the scholastic analysis of what constitutes capital investments.

The group of transactions considered by the natural law theory of usury can be categorized into two main areas, delineated by the scope of investment. The first group includes various investments in a going concern business venture, whereas the second is centered on the returns from a specific asset or pools of assets. Historically, within the first group, the pooling of assets and labor directed toward a common profit-seeking enterprise, variations with respect to the scope of the venture and its time horizon are observable.

A *commenda*, dating from at least the tenth century,[69] involved one party who would commit or entrust (*commendare*) merchandise, or capital to buy merchandise, to a merchant for a specific period of time and purpose—for example travelling to a particular fair to sell the goods in exchange for a percentage share of the profits made from the sale.[70] The amount of the

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power of an active cause, inasmuch as it ministers food to the whole plant; whence, in human acts, the will and intention are compared to a root, so that if it is perverse, the work will be perverse; this, however, is not necessary in that which is matter . . ." (translating and quoting ST. THOMAS AQUINAS, QUAESTIONES QUODLIBETALES III, Q. 3, Art. 19)).

68. *See* McCall, *supra* note 42, at 569-80.

69. *See* W.J. ASHLEY, AN INTRODUCTION TO ENGLISH ECONOMIC HISTORY AND THEORY: PART II. THE END OF THE MIDDLE AGES 412 (New York, G.P. Putnam's Sons 1893).

70. *Id.* at 413-15. Ashley includes two examples of typical *commenda* contracts: "Ego bonus vasallus maraccius accepi in commendacionem a te wilielmo filardo libras 50 in pannis, has portare debeo apud messaniam laboraturm et ex inde quo voluero, quartam proficui habere debeo et expensas debeo facere per libram;" and "Ego Paschalis Tresmezaillas confiteor et recognosco tibi

percentage share varied depending upon the details of the arrangement. For example, if the merchant who would conduct the trading voyage contributed none of the capital, he would typically be entitled to one quarter of the profits plus expenses.[71] If the trading merchant also contributed capital assets, his percentage share would increase proportionately with the amount of his investment.[72] The three significant characteristics of this legal form are the retention of an ownership right in the capital, or the goods purchased with such capital, by the entrusting partner exemplified by the use of the term "in *commenda*" with its connotation of entrusting. Secondly, the percentage return was subject to the risk of the specific venture being profitable; if the goods did not sell, the partner entrusting goods merely received them back. Finally, the party who took no part in the active trading was not liable for the debts of the trading partner; if the venture failed (e.g., by being lost at sea), his only exposure was the loss of the entrusted goods.[73]

A *commenda* was generally limited in scope and time to a particular voyage or fair circuit, and it was therefore complimented by longer-term forms of business investment. The company and the *societas* involved a longer-term investment in a business rather than a specific business transaction. The company was usually an association of craftsmen or merchants, often of the same family, working and living together in the same house and shop.[74] All of the members of the company were liable for the business.[75] As this type of structure involved merely the pooling of labor, it is not particularly relevant to our analysis of capital investment.

The *societas*, or partnership, was a form-facilitating capital investment that transcended a single voyage or trading circuit. The contract form existed in

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Johanno de Mandolio me habuisse et recepisse a te in comanda 40 libr. regalium coronatorum, implicatas in 1 caricha piperis, etc. . . . cum qua comanda predicta ibo . . . ad lucrandum et negotiandum in viagium Capte . . . ad tuum resegum et ad quartam partem lucri." *Id.* at 478 n.125 (citations omitted). This can be translated as "I, Maraccius, a good vassal, have accepted in entrustment (*commendacionem*) from you Wilielmus Filardus 50 pounds in cloth, I ought to carry these having worked near Messina and from that place I will have travelled in a circuit whither; I ought to have the fourth part of profit and I ought to make expenses by the pound;" and "I, Paschal Tresmezaill, confess and admit I held and undertook for you, John of Mandol, by you in entrustment (*commenda*) 40 pounds of the royal crowns, together with one measure of peppers . . . etc. Furnished with which aforementioned, I will go . . . to take a voyage near your kingdom to make a profit and trade and for a fourth part of the profit." (author's translation).

71. *Id.* at 413.

72. *See id.* at 413-14.

73. *See id.* at 416.

74. *See id.* at 415. The fact that the business partners would share the same household, sharing common bread, probably gave rise to the modern word (company) from the Latin *cum panis*. *See id.*; *see also* JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA 8 (2003).

75. *See* ASHLEY, *supra* note 69, at 415-416; *see* MICKLETHWAIT & WOOLDRIDGE, *supra* note 74.

Roman law, where it was a "pooling of resources (money, property, expertise or labour, or a combination of them) for a *common purpose*."[76] Each partner's claim to profit and return of capital were contingent upon the success of the business venture.[77] Although Roman law allowed the partners to allocate the partnership profit and loss among themselves, a partner could not shield himself from loss by allocating all of the loss but none of the gain to one partner.[78] Although the form provided no asset shielding for the partners vis-à-vis third parties,[79] if the partnership's assets were lost, a partner could not recover his investment and hoped-for gain from the personal assets of the other partner.[80]

When the Medieval lawyers, canonists, and philosophers turned their attention to examining this Roman law contract under usury theory, they distinguished a partnership from a money loan on two grounds. First, as with the *commenda*, the partner retained an ownership interest in the capital contributed because he bore the risk of its loss during its use in the venture,[81] as evidenced by the restriction on recovery of invested capital from the personal assets of the other partner. The inability of the other partner to use the invested money in a way not in accordance with the common venture demonstrated an attribute of retained ownership in the invested capital. The nature of the partners' ownership of contributed assets changed; the two partners became joint owners of the capital rather than sole owners of their contributed share.[82] They also contractually agreed to limit the use of their joint property in accordance with their specific common purpose. Thus, although the nature of their ownership had changed, they still retained an ownership interest in the joint assets. This retained ownership distinguished the *societas* from a money loan, or *mutuum*, since in a *mutuum* the lender lost any ownership interest in the money provided as the borrower was free to consume it in use.[83] Further, the return of profit on the investment in a *societas* was subject to business risk whereas in a loan it was subject merely to contractual default risk. Usury was merely a function of time whereas in a *societas*, the gain of a partner was contingent on the business making a profit.[84] St. Thomas Aquinas provides a succinct summary of the distinguishing characteristics of a partnership from a loan:

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76. REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 451 (1990); *see also* Henry Hansmann et al., *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333, 1356 (2006).

77. *See* ZIMMERMAN, *supra* note 76, at 458-59.

78. *See id.* at 459 (a purported agreement where one partner bore only loss and no gain was referred to as a *societas leonina*).

79. *See id.* at 458-59.

80. *See* NOONAN, *supra* note 52, at 134.

81. *See* ASHLEY, *supra* note 69, at 419.

82. *See* ZIMMERMANN, *supra* note 76, at 465 ("[E]ach [partner] having 'totius corporis pro indiviso pro parte dominium.'").

83. *See id.* at 165 (describing a *mutuum*); ASHLEY, *supra* note 69, at 419.

84. *See* ASHLEY, *supra* note 69, at 419.

> He who lends money transfers the ownership of the money to the borrower. Hence the borrower holds the money at his own risk and is bound to pay it all back: wherefore the lender must not exact more. On the other hand he that entrusts his money to a merchant or craftsman so as to form a kind of society, does not transfer the ownership of his money to them, for it remains his, so that at his risk the merchant speculates with it, or the craftsman uses it for his craft, and consequently he may lawfully demand as something belonging to him, part of the profits derived from his money.[85]

The ability of the partners to agree among themselves the particular allocation of the profits of a *societas* led to the development of variations of the form. In the sixteenth century, the triple contract (*contractus trinitas*) involved the addition of two significant features to the accepted *societas*.[86] In the first new feature, one partner agreed to exchange the percentage share of uncertain future profits of the partnership for a fixed amount of guaranteed profit payments.[87] In the second contract, one partner insured the return of the other partner's capital in exchange for a further reduction of the agreed guaranteed profit.[88] Usury theorists of the sixteenth century had to grapple with the question of whether these two additions destroyed the substantial differences between a partnership and a money loan, a form of retained ownership and the presence of business risk. Although the debates were sometimes intense and examples of prominent thinkers on either side can be found,[89] by the end of the eighteenth century a consensus emerged, recognizing the triple contract as distinct from a usurious money loan.[90] Because each element (the simple *societas*, the exchange of the unlimited share of profits for a fixed return, the insurance of this fixed return, and the initial capital by the other partner in exchange for a reduction in return) could be distinguished from a money loan, their combination seemed to be distinguishable as well.[91] Partners

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85. AQUINAS, *supra* note 28, at 1521.

86. *See* EDWIN S. HUNT & JAMES M. MURRAY, A HISTORY OF BUSINESS IN MEDIEVAL EUROPE 243 (1999).

87. *See id.*

88. *See id.*; ASHLEY, *supra* note 69, at 440; NOONAN, *supra* note 52, at 209.

89. *See* NOONAN, *supra* note 52, at 227-28.

90. *See id.* at 228-29.

91. *See* ASHLEY, *supra* note 69, at 440-441 ("*A* man could enter into partnership with *B*; he could insure himself with *C* against the loss of his capital; and he could insure himself with *D* against fluctuations in the rate of profit. If all this was morally justifiable, why should not *A* make the three contracts with the same man, *B*?") (emphasis added); NORMAN JONES, GOD AND THE MONEYLENDERS: USURY AND LAW IN EARLY MODERN ENGLAND 11 (1989). It appears that a rate of five percent of the original capital became a common amount agreed to in lieu of a percentage of the profit. *See* HUNT & MURRAY, *supra* note 86. The theory justifying the triple contract did not depend on this particular amount necessarily. Five percent was not a fixed legislated maximum. The requirement was that the exchange of risk for a fixed return involved a sale not a loan and was thus governed by the just price doctrine not the usury doctrine (i.e. that the exchange of the

could allocate future profits from the *societas* as they chose so long as they did not create a *societas leonine* (where one partner bore all of the loss and no gain).[92] Even though one partner agreed to assume the risk of loss of his partner's investment and guaranteed his partner a preferred payment of future profit, this partner was not left with only loss and no possibility of gain; in fact his percentage of gain has increased by the amount accepted in exchange for the fixed return. The fact that the insured partner had to pay for the risk he shifted to his partner indicates the presence of risk for the partner. The requirement that the partnership actually engaged in business and have a prospect of success was the final characteristic distinguishing the triple contract from a money loan.[93] Finally, even though one partner "guaranteed" a return to the other partner, the risk of ownership still existed as *socii* were liable for the acts of the *societas* and their capital could thus be lost, leaving them to look to the guaranty by the other partner, the value of which could be affected by the failure of the *societas*. The guaranty related to there being assets left to satisfy the claim.[94]

Angelus Carletus de Clavasio presents a typical example of the defense of the triple contract using such arguments. A partner who "commonly for profit of the partnership . . . would have received 6 per cent or 8 per cent and sometimes more, so he agrees with his partner that his partner give him only 3 per cent or 4 per cent as profit and insure him on the capital."[95] Because a *societas* was distinguishable from a usurious loan and because insurance (the sale of the risk of an uncertain result for a fixed price) was universally accepted as an otherwise acceptable sale subject only to the just price constraint,[96] their combination was permissible. The risk inherent in speculative business ventures was sufficient evidence, as had previously been concluded, of retention of ownership of the capital invested and retention of ownership (at least joint) distinguished the

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fluctuating return of a partnership interest and risk of original investment for a fixed profit must be a just exchange). Five percent was discussed by many as an amount under the existing circumstances that appeared within the range of the just price and in many areas it thus became common. *See id.* at 18, 28. For more detailed information on the just price theory, see Brian M. McCall, *Learning from Our History: Evaluating the Modern Housing Finance Market in Light of Ancient Principles of Justice*, 60 S.C. L. REV. 707, 716-21 (2009).

92. *See supra* note 78 and accompanying text.

93. *See* ASHLEY, *supra* note 69, at 447 (noting that merely calling a loan a partnership did not save the transaction from the usury prohibition if the purpose was for consumption and not business).

94. *See* ZIMMERMANN, *supra* note 76, at 467-69; JEAN PIERRE GURY, COMPENDIUM THEOLOGIÆ MORALIS, pars i. n. 917 (7th ed. 1858) (teaching that the condition "ut quivis socius subeat onus damnorum et expensarum, quae intuitu societatis adveniunt" was necessary for a triple contract to be accepted as a true partnership).

95. NOONAN, *supra* note 52, at 204-05 (quoting ANGELUS CORLETAS DE CLAVASIO, SUMMA ANGELICA DE CASSIBUS CONSCIENTIAE n.7 (1485)).

96. *See id.* at 203 ("Thus, without any important opposition whatsoever, the insurance of property was accepted by the theologians.")).

societas from the *mutuum*, or money loan.[97] The purchase of insurance against this risk did not defeat the indices of ownership because the desire to purchase insurance indicated rather than disproved the presence of business risk.[98] Further, the entitlement to profit from a partnership arose from the use of capital in a business with a prospect of making a profit.[99]

Although some who objected to the acceptance of the triple contract criticized the argument as paying excessive attention to the form of the transaction,[100] the debate[101] was not a discussion of form for form's sake. Rather the defenders were attempting to discern if the change in form of the *societas* altered the substance of the transaction enough to change it from a capital investment into a money loan. Those on the prevailing side still found evidence of ownership of capital (although the risk giving rise to this was insured against) and the fructifying of productive assets that gave rise to the right to profits. Thus, the fundamental theoretical framework of the usury theory was essentially intact and merely applied to a new, more complicated factual context.

Once the three components of the triple contract are individually and then collectively accepted, the end result, which can be summarized as the contribution of capital to a business in return for a preferred fixed agreed return and a right to recovery of the capital invested guaranteed by the other investors, is accepted even if the separate components were no longer precisely documented. Defenders of the triple contract saw its components as implicit contracts within the investment of capital with a merchant in any business venture even if not explicitly stated as a partnership and insurance contracts.[102]

All of the above forms involved investing capital in a business venture, short term as in the *commenda* or longer term as in the *societas*. Another form existed for specifically investing in productive assets rather than a venture.

The *census* or *rente* contract existed through the Middle Ages and survived into modern times. John Munro provides an excellent summary of this investment contract from Carolingian times:

> [T]he Carolingian *census* contract [was a form] that many monasteries had long utilized in order to acquire bequests of lands, on condition that the donor receive an annual usufruct income (*redditus*) from the land, in

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97. *See id.* at 205.

98. *See id.*

99. *See id.* at 205-06; BENEDICT XIV, DE SYNODO DIOECESANA, lib. x. c. 7, 2 (1755) (noting in a description of a licit triple contract, that the investing partner must have credible hope ("*probabiliter sperat*") of making more profit than the agreed fixed return, otherwise he would not be trading anything for the guarantee of the fixed return).

100. *See* JONES, *supra* note 91, at 14.

101. Although those holding the triple contract not a usurious loan in substance prevailed in establishing a consensus, there were some who argued even into the eighteenth century that the triple contract in substance so altered form of a *societas* that the triple contract was in fact a loan and any profit from it usurious. *See* NOONAN, *supra* note 52, at 225-28.

102. *See id.* at 269-71.

> kind or money, for the rest of his life and sometimes for the lives of his heirs. The income was deemed to be part of the "fruits" of the property (for example, the harvest): originally it was paid in wheat, wine, olive oil, or similar commodities, and, from the twelfth century, more commonly in money. For that reason, the *census* or *cens* came to be known as a "rent" or *rente*, from which we derive the term *rentier*. The closest equivalent in modern English is the annuity, although this term does not imply that the annual return was necessarily based on a "fruitful good," as stipulated in all medieval discussions of both *rente* and *census* contracts, in both canon and civil law.[103]

A fundamental feature distinguishing the *census* or *rente* contract from a loan at interest was that the payments were derived from a productive asset.[104] Outside of agricultural resources, a *rente* could be sold on an artisan's stall or other income-producing asset.[105] The *census* can be thought of in modern legal terms as a partial property right (such as mineral rights in land) or the securitization of a fixed amount of annual future income from an asset or asset pool. The connection to property law of a *census* contract can be seen in the discussion of its permissibility where it is discussed as a purchase and sale.[106] Although many canonists, philosophers, and theologians expressed concern that this form of contract could be used as a subterfuge to disguise what was really just a consumer loan at usury (*in intentione usurias esset*),[107] their concern was not a rejection of a legitimate *census* on a productive asset (*res frugifera*). Putting aside the outcome of the debates of whether a redemption feature or a set number of years was sufficient to convert a lawful sale of future income into a disguised usurious loan, the participants recognized the right of an owner of productive property to sell a portion of his rights to future fruits that the property

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103. John H. Munro, *The Medieval Origins of the Modern Financial Revolution: Usury, Rentes and Negotiability*, 25 INT'L HIST. REV. 505, 518 (2003) (footnotes omitted).

104. ABBOTT PAYSON USHER, THE EARLY HISTORY OF DEPOSIT BANKING IN MEDITERRANEAN EUROPE 140 (1943) ("[S]uch rent-charges could be created only when the annual income from the property exceeded all preëxisting burdens. . . . The tenant of agricultural land might be able to create a rent-charge if the produce of his land had risen above the level of his tenurial obligations.").

105. *See* ASHLEY, *supra* note 69, at 410-11. An attempt to base a *census* on the future personal income of a person was seen as illicit as not founded on a real asset, although some authors would admit a *census* founded on the labor of one's serf. *See* NOONAN, *supra* note 52, at 159.

106. *See, e.g.*, INNOCENT IV, *supra* note 63, titulus XIX, caput 5. Innocent IV analyzes the contract as a transaction *contractis venditionis*, in contracts of sale of goods. Thus, it is generally licit as long as the future income stream is sold for a just price (understood in the context of a credit sale where there is doubt as to the future value of the thing sold (*venditio sub dubio*) which Innocent IV has just discussed in the preceding part of this chapter), or the common estimation (*communi aestimatione*). Innocent IV describes the future payments as coming forth (*emisset*) from the property the subject of the sale transaction and not personally from the *census* seller. For more information on just price theory and *venditio sub dubio*, see McCall, *supra* note 42, at 576-78.

107. *See* ASHLEY, *supra* note 69, at 408-11; NOONAN, *supra* note 52, at 154-64.

generates.[108] Fundamentally, what distinguished a *census* from a *societas* on one hand and a usurious loan on the other was that the extent of the *census* return was limited to the agreed periodic *census* payment (not a percentage of profit) and was subject to the asset base actually producing a minimum return to pay the *census*.[109] Unlike a loan for usury, a *census* buyer bore the risk of sterility of the *census* base that constituted indices of ownership of an interest in the asset base.[110]

Thus, the natural law theory of usury provided a wide range of options for structuring an investment in businesses. The forms varied, depending on the negotiation of the parties involved, to permit a property right in future profit which was tied to a specific asset (as in a *census*) or a particular business transaction (as in a *commenda*) or to a business generally (as in a *societas*). The forms left latitude to the parties to structure the method of sharing in the success or failure of the business or asset.

First, there could be a divided unlimited return (proportioned according to the amount invested in a basic *societas*) as in modern equity instruments. Second, some partners could choose smaller but fixed annual amounts (as in the case of the *contractus trinitas* or the *census*) as in modern fixed coupon debt securities or special purpose vehicle asset securitization.[111] Further, the investors were free to guarantee to one investor the return of capital or guaranteed profit payment and this guaranty could be general or limited to the invested capital of the guarantying partner. The common substantive characteristics that transcend these legal forms are: (1) some form of property right in business assets, (2) profit having some contingency based on business risk, and (3) legitimate gain coming from productive assets or business ventures. Natural law justified earning a return from these contracts because the investor held some property right in the assets producing them. Despite the ability to reallocate gains and losses, business failure risk of some degree fundamentally distinguished these transactions from a simple loan of money, the return of which bore no relation to its productive use. Finally, gain was licit because the amount paid was merely a share of fruits or profits made possible by the investment that was sold in advance. The use of the word "debt" to describe both a consumer loan to buy clothing and the purchase of a corporate bond is impossible according to the natural law usury theory. Investment of capital in businesses and their assets in all these forms bear no similarities to loans of money to procure consumption. A business lender is to a greater or lesser extent, depending on the terms of their

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108. *See* NOONAN, *supra* note 52, at 154-64.

109. This is most obvious in the early form of the *census* in which payment was made in the fruit itself (a portion of the crop of a field for example). Later the transactions were simplified so that the *census* seller could substitute an equivalent in money rather than delivering the fruit itself much like the cash settlement of a modern futures contract. *See id.* at 155.

110. *See id.* at 157-58; ASHLEY, *supra* note 69, at 410.

111. As noted, *supra* note 91, other theories or bodies of law (i.e., contract formation or just price theory) did regulate the process and substance of the negotiations over these amounts.

agreed relationship, a business partner with the firm.[112]

Thus, the modern distinctions between equity and debt securities, general partners, and shareholders are distinctions without a difference according to the natural law usury theory.[113] All are merely contractual variations of one form of transaction distinct from the mere lending of money in exchange for a promise to return it. In this sense, the natural law distinction comes close to some modern finance theory, which is beginning to see corporate debt as not fundamentally different from equity, but merely another way to allocate property rights in the firm's assets, corporate governance responsibility, profits from the business, and priority of loss bearing risk.[114] Among this literature, Armour and Whincop argue for an understanding of corporate governance and capital structure, as does the natural law theory advocated in this Article, as a process of delineating property rights and allocating future profits.[115] The variety of forms of structuring business finance (debt and equity) represent merely "more than one way" of "partitioning . . . property rights" and "dividing quasi-rents between contractors."[116] Although this division is accomplished by and for the benefit of investors and managers, it can, upon the giving of proper public notice, bind outsiders who deal with the firm because it involves property rights.[117] In this context the institution of security is a means for informing outsiders of the contractual arrangement among investors in a firm with respect to their retained ownership interests.

Two characteristics of all the forms of investment of capital discussed so far distinguish them from the mere loan of money at usury. First, all involve the transformation of money into capital invested in an income producing business or asset as opposed to money being spent for consumption. Second, the investor's hoped for gain is related at some level to profit being generated by the borrower/investee. Although the details of each type of bargain vary, this right to share in business profits is the substance for which the capitalist exchanges

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112. In practice business bankers acknowledge that their relationship with their corporate borrower is much more than a lending of money to be returned and more of a business partnership. *See* Scott, *supra* note 7, at 948 (quoting a vice president of Chase Manhattan Bank as saying "a banker should act almost in the position of a partner") (citation omitted).

113. LEONE LEVI, MANUAL OF THE MERCANTILE LAW OF GREAT BRITAIN AND IRELAND 118-19 (1854) (noting that partnerships and corporations are really two forms of the same thing; and that in the history of their development they were originally seen as two forms of partnership, one private and contractual and the other public and formed by the Crown or Act of Parliament and interests divisible into shares).

114. *See, e.g.*, John Armour & Michael J. Whincop, *An Economic Analysis of Shared Property in Partnership and Close Corporations Law*, 26 J. Corp. L. 983 (2001); Ronald J. Gilson & Charles K. Whitehead, *Deconstructing Equity: Public Ownership, Agency Costs, and Complete Capital Markets*, 108 COLUM. L. REV. 231 (2008); Milton Harris & Artur Raviv, *The Theory of Capital Structure*, 46 J. FIN. 297 (1991).

115. *See* Amour & Whincop, *supra* note 114, at 988-91.

116. *See id.*

117. *See id.* at 992-94.

money. Although the extent differs, all of the investments involve some form of risk of failure to generate the expected profit. The *census* buyer runs the risk of the sterility of the *census* base. The entrusting partner in a *commenda* risks that the merchant will not be able to sell goods. The *societas* may not make enough profit to pay the hoped for return to a *socius*. Even in the *contractus trinitas*, the investor faces the risk that the *societas* will not generate a profit and he will have to look to the guaranty by his fellow investor, which may be contractually limited to the value of that partner's partnership interest. Business gain and risk of failure are a hallmark of all the transactions. If these two characteristics are not preserved, the transaction is a mere loan of money;[118] therefore, any profit is a charge for the lending of money to the business entity, which the natural law treats as unjust.[119]

III. APPLICATION TO THE INSTITUTION OF SECURITY

This Part applies the theory of business investment developed out of the natural law usury theory in Part II to the institution of security. It argues that security interests are a justified means of achieving some of these capital investment arrangements. Finally, it proposes some limited changes to the current legal regime governing security interests.

For the purposes of this analysis, the term creditor as used in secured credit law[120] needs to be broken down into two different categories. A distinction must be made between capital investors in a business or assets who may have property claims and claims to a share of profits, and those who are simply owed the repayment of money. To facilitate discussion, this Article refers to the first group as "Debt Investors" and the second as "Monetary Creditors." Debt Investors include those who provide capital to businesses in exchange for a negotiated combination of contractual and property rights relating to assets of, and future profits from, the business. Typical modern forms include secured and unsecured notes, bonds, and debentures and securitization structures.

Monetary Creditors comprise those who have not sought to invest capital in a business in exchange for a bundle of claims relating to return of capital and a share in profits of the business. To express the definition in the affirmative, they are creditors entitled to the payment of a specified sum of money, as opposed to capital, by the business, unrelated to profits of that business. Examples are parties entitled to payment of a contractual obligation (other than one documenting the relationship with a Debt Investor), payments owed to the governing authority as a result of positive law, settlement of a delayed payment transaction, and claims for monetary payment as compensation for harm caused for which the law provides a remedy. Examples of categories of Monetary Creditors are employees, trade creditors, taxing authorities, and tort victims.

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118. *See supra* notes 41-44 and accompanying text.

119. *See supra* note 44.

120. Secured credit law refers to both state law (specifically Article 9 of the Uniform Commercial Code) and Federal Bankruptcy Code.

Monetary Creditors, like lenders of money for consumption (in the natural law sense of the term *mutuum*), have a legal claim for the payment of a fixed monetary sum plus any compensation for loss arising from non-payment when due. They have no just claims to profit or gain on their dealing with the business, but merely claims under commutative justice to an equitable settlement of their monetary liabilities.

Although some examples of forms of transactions representing these two categories have been listed, the definitions present fact intensive questions. Thus, the fact that an employee may document his right to payment of wages by issuing a note does not necessarily transform his status from a Monetary Creditor to a Debt Investor (unless of course in substance, the employee, and business agree that the employee may invest his salary as capital in the business).[121] In summary, the economic difference between the two is that Debt Investors look to share in some profit of the business whereas Monetary Creditors look to recover a fixed payment of money (plus any damages due to non-payment).

Debt Investors equate, in the natural law language, to a *socius* in a *societas*, or an entrusting partner in a *commenda*, or a purchaser of a *census*, with each entitled to certain negotiated property rights in their invested capital and rights to future profits.[122] Once Debt Investors are distinguished from Monetary Creditors, the varying claims of Debt Investors must be separated. These must be broken down into claims to the return of invested capital and claims to a share of profits. The natural law theory justifying the nature of these different claims will shed light on the nature of the property claim on assets represented by a security interest.

A. First Claim—Return of Invested Capital

The first claim is for a return of the original capital invested. The most relevant aspect is the priority of this claim in relation to all other capital investors. As such, it is reached through contractual agreements with the business and other investors, directly or indirectly. The natural law theory allowed great freedom to the investor and investee in determining the priority of this claim and the relation of the claim to the capital invested. The relationship involved the retention of varying forms of property rights over the invested capital. A broad spectrum of options is discernable from the historical forms discussed in Part II. The property right in a *commenda*, as an entrustment, was

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121. Interestingly English company law still preserves a distinction between these types of creditors and it refers Debt Investors as holders of "loan stock," which is treated as part of the capital of the company. There does not appear to be a legally significant difference, however, in the way the two groups are treated for priority purposes. *See, e.g.*, Criminal Justice Act, 1993, c. 36, § 2 (Eng.) (including "loan stock" in the definition of debt securities); Financial Services and Markets Act, 2000, c. 8, § 12, sched. 2 (Eng.) (including "loan stock" in a definition of instruments creating indebtedness).

122. *See supra* notes 69-71, 76-78, 103 and accompanying text.

the strongest form of retained ownership.[123] The transaction involved only an entrustment of identified assets to a merchant who traded on behalf of the entrusting partner. The assets remained under the exclusive ownership of the investor while possession passed to the trading merchant. The investor could choose, however, to transfer more of a property right than an entrustment as in a *commenda*.

In a *contractus trinitas* a partner transferred ownership of capital to a partnership but received in return a claim to the return of the value of that capital guaranteed by the other partners.[124] This involved only a property right to the amount of that capital from the partner and not a right to assets of the partnership itself.[125] A weaker form of property right was involved in a simple *societas*, where the investor transforms ownership into joint ownership with the other partners and retained no individual property right to the return of the invested assets or capital. Finally, the *census* represented merely the purchase of fruits or income from assets and no property right in the assets themselves, as distinguished from their fruits, or any claim to return of the purchase price.[126]

Four categories of Debt Investors can be discerned based on the analysis of the *commenda*, *contractus trinitas*, *societas*, and *census*. Modern transaction forms will next be identified for each category and the function of the granting of a perfected security interest in that transaction explained by viewing each category in light of the historical precedents presented in Part II.

First, the investor may choose to only entrust possession of assets to a business for a constrained use (e.g., an attempt to sell them) and require return of any unused asset upon completion of the agreed period. The Debt Investor may contribute his investment and may restrict the use of the assets associated with that investment through the retention of a security interest therein, as in a consignment.[127] For example, the secured Debt Investor may restrict transfer of the specified asset. If this is the case, a third party cannot obtain an interest in the property to the extent of the reserved interest by the secured Debt Investor. The details of the reservation of a property right must be determined by reading the applicable security agreement. The secured Debt Investor's filing of a financing statement serves the functions of putting third parties on notice that transfer to them may be restricted by a conflicting property right.[128] Some

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123. *See supra* note 6 and accompanying text.

124. *See supra* text accompanying notes 86-94.

125. *See supra* notes 87-88 and accompanying text.

126. *See supra* text accompanying notes 103-10.

127. Article 9 defines a consignment as "a transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale" and which meets certain other technical requirements. U.C.C. § 9-102(a)(20) (2001).

128. One may argue that the contents of a financing statement are insufficient public notice of the nature of the reserved rights, as does Lynn LoPucki. *See* LoPucki, *supra* note 3, at 1963-65 (proposing to encourage disclosure of more information in public filings by creating presumptions that certain items are not in an agreement unless disclosed). LoPucki states, "It holds voluntary unsecured creditors to the terms of security agreements to which they did not in fact agree and to

commentators have objected that even public notice of a security interest is unfair to involuntary creditors such as tort victims.[129] These involuntary creditors cannot benefit from any public disclosure of reserved property rights because they do not choose to become a creditor to the debtor.[130] Yet, one must be precise about what is unfair in this situation. The fact that an investor did not transfer unrestricted ownership of his original investment to the tortfeasor is not the source of the injustice; rather, it is that a tort has been committed against the victim (or a debt otherwise created involuntarily). Allowing the investor to limit the amount of his investment by reserving a property interest and restricting voluntary or involuntary transfer is no more unjust than a tortfeasor failing to obtain a greater investment from potential investors. Taken to its logical conclusion, this line of argument suggests that it would be unjust that the tortfeasor did not have a higher paying job that would have enabled his satisfaction of the judgment.

The second category involves retention of a weaker property right with the actual transfer of the ownership of the asset to the business but with a guaranty of return of the value of the capital committed, as in a *contractus trinitas*.[131] Ownership of the asset transfers from the investor to the business subject to a commitment to return the contribution under agreed circumstances. An example of this type of transaction would be a secured Debt Investor who does not restrict transferability of the asset associated with the capital investment through a security interest. In this context the security interest is the method of achieving the guarantee of returning the capital originally invested so long as it is still owned by the business. The security agreement identifies the capital invested and the rights of the secured creditor to repossess the collateral (to the extent still owned by the business) and functions as the guaranty of the returned capital.

The analysis of this category of transaction thus far has used the term "asset" or "capital" in a general sense that must be clarified before advancing further. In the instance where an asset other than money is invested the security interest, as with a consignment, identifies the specific asset contributed and guarantees its return. When a Debt Investor provides the investment of capital in the form of liquid funds, however, the security interest serves a slightly different purpose: It identifies the productive asset into which the money is to be transformed.

As a medium of exchange, money can only be evaluated in terms of that for which it is exchanged.[132] The grant of a security interest can be re-characterized as the purchase of assets by the investor from a third party (as in a Purchase

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which they do not even have access. The terms of those agreements are binding regardless of how unreasonable they may be." *Id.* at 1963. Yet, despite the potential merit in requiring more disclosure in a financing statement of the nature of the secured party rights or, alternatively, the public filing of security agreements, the issue of fair disclosure is separate from the justification for the restriction on transfer of the asset and the corresponding reserved property right.

129. *See, e.g.*, LoPucki, *supra* note 3, at 1901.

130. *See id.* at 1898-1912.

131. *See supra* text accompanying notes 86-94.

132. *See supra* notes 45-52 and accompanying text.

Money Security Interest[133]) or from the business itself followed by a contribution of those specific assets (or a portion thereof) to the business with a retained guaranty of their return. The claim of the Debt Investor can be re-characterized as a claim to a return of the specific asset contributed or the assets associated with the capital such investor contributed. When the amount invested is less than the value of the assets upon their repossession, the Debt Investor must return any excess above the capital claim to the business.[134] The Debt Investor and the business can agree that this contributed asset is to remain in its current form or they can agree that the business is permitted to exchange this asset for different assets.

So far, existing Article 9 law appears consistent with this re-characterization of a secured business loan as a *contractus trinitas* with its guaranty of return of capital invested and retention of ownership in the assets directly or indirectly contributed to the partnership. Yet, there is one aspect of current law that appears inconsistent, and thus, is perhaps a candidate for reform. In two ways current Article 9 allows the value of collateral to increase above the amount of the original capital invested.[135] Article 9 authorizes a business to grant a security interest in after acquired collateral without limit to amount.[136] An after-acquired property clause does not in and of itself appear inconsistent with the proposed re-characterization of the transaction thus far. It could be used to accommodate a Purchase Money Security Interest (PMSI), for example, where the Debt Investor provides the money prior to the purchase of the assets by the business.[137] Yet, the analysis thus far implies that when assets are identified through the granting of a security interest, as those into which the capital contributed is to be transformed, then the value of the assets subject to that security interest cannot exceed the value of the capital contributed.[138] Thus, we can conclude, at least provisionally, that an after-acquired property clause should be limited in its effectiveness to a total value of collateral not exceeding the original investment.

The second aspect of Article 9 that appears inconsistent with the proposed

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133. *See* U.C.C. § 9-103 (2001) (defining a purchase money security interest).

134. *See id.* § 9-608; *see also* 11 U.S.C. §§ 101(12), 502 (2006). Both the Uniform Commercial Code and bankruptcy law calculates the surplus differently as the secured party is entitled to retain more than the original capital invested. *Compare* U.C.C. § 9-608, *with* 11 U.S.C. §§ 101(12), 502. The Code uses the phrase all "obligations" secured by the security interest, which can include obligations to pay interest. *See* U.C.C. § 9-608. The Bankruptcy Code uses the terms "claim" and "debt" to refer to whatever the contract between the debtor and creditor says is owed. *See* 11 U.S.C. § 101(5), (12). Claims to costs and interest are dealt with *infra* notes 145-49 and accompanying text.

135. One justification for this policy could be that the value of the claim is increasing as interest accrues. The right to use collateral to achieve priority for interest payments is discussed *infra* notes 139-44 and accompanying text.

136. *See* U.C.C. § 9-204 (2001).

137. *Id.* § 9-103.

138. *See* discussion *supra* Part II.

analysis is the treatment of proceeds.[139] A Debt Investor may agree that the assets identified as his investment may be sold or exchanged for other assets.[140] Yet, Article 9's definition of proceeds goes beyond a mere tracing of the original invested value through exchanges of assets.[141] It allows the value of the collateral to grow in several ways. First, proceeds does not require, in all cases, the sale, transfer or exchange of the collateral.[142] It includes payments received as a result of the collateral such as rental payments.[143] Secondly, the combination of the definition of proceeds and the rule that security interests can continue in the collateral sold or transferred, allows the value of collateral to increase by the addition of proceeds.[144] Article 9 does not allow the secured party to recover more than their total claim (which includes interest) against the debtor,[145] yet, it reserves more assets to guarantee that claim that originally contributed by the Debt Investor.[146] This growth would only be justified if it were justified as guarantying another claim of the Debt Investor beyond return of the original capital contributed.

The Bankruptcy Code treats after acquired property and proceeds differently, and, under at least one reading, more in accord with natural law concepts than Article 9 does. First, the Bankruptcy Code limits the effectiveness of an after acquired property clause as of the commencement of the case.[147] Thus, although not completely aligned to the proposed analysis of a secured creditor's claim, at least as of the time of the assertion of jurisdiction of the bankruptcy regime over the situation, it disallows the expansion of the collateral base. Second, at least one reading of the definition of proceeds contained in section 552(b) of the Bankruptcy Code[148] limits the value of a security interest in post-petition proceeds to the value of the pre-petition collateral converted or transformed into such proceeds,[149] which does not permit an expansion of the value of the

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139. *See* U.C.C. § 9-102(a)(64) (2001) (defining "proceeds"); *id.* § 9-203(f) (extending a security interest to proceeds of collateral).

140. *See id.* § 9-315 (permitting security parties to authorize disposition of collateral); *id.* § 9-205 (validating freedom of secured party and debtor to restrict or allow use and disposition).

141. *See* U.C.C. § 9-102(a)(64) (2001).

142. *See id.*

143. *See id.*

144. *See id.* § 9-315(a).

145. *See id.* § 9-201 (limiting the effectiveness of a security agreement to its terms).

146. *See id.* § 9-315.

147. 11 U.S.C. § 552 (2006).

148. Section 552(b)(1) of the Bankruptcy Code provides, in part, "if the security interest created by such security agreement extends to . . . proceeds . . . then such security interest extends to such proceeds . . . to the extent provided by such security agreement and by applicable nonbankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise." *Id.*

149. *See In re* Northview Corp., 130 B.R. 543, 548 (B.A.P. 9th Cir. 1991) ("It appears that in sub-part (b) Congress intended to preserve the viability of security interests which attached to pre-petition collateral notwithstanding that the collateral might subsequently be converted into a

collateral as under Article 9. Thus, Article 9 (but at least not one of the possible interpretations of the Bankruptcy Code) would seem to go beyond the natural law limitations on capital investments in allowing the unlimited effectiveness of an after acquired property clause and attachment of a security interest to proceeds.

In the third category, the investor relinquishes a property right in the specific asset invested and agrees to a lower priority return of capital shared with other investors pro rata. This is a simple *societas* where ownership of capital became joint and pro rata (in agreed proportions) and could be transferred by any partner to a third party, subject to the liability of a transferring partner to other partners for violating a term of their partnership.[150] Such an agreement is in exchange for a higher percentage return than in a *contractus trinitas*. By foregoing the retention of an individual property interest in the capital, the assets representing the capital are capable of being consumed or transferred by the business in its operation. This is the added risk these investors agree to in their bargain. The implication is that these investors' claims to the return of capital are subject to claims of Monetary Creditors who are owed money by the business. Put another way, their capital is completely subject to the risk of the operation of the business. This category encompasses unsecured Debt Investors and investors in all equity securities. Here, a security interest would not be present because there is no guaranteed claim to a return of capital and no retention of ownership to facilitate that guaranty.

Finally, in the fourth category the investor retains no property right in the invested capital but merely purchases a priority right to payment of an agreed amount of revenues generated from a set of assets, as in the purchase of a *census*.[151] An example of this category involves the securitization of future income or the sale of accounts receivables. In these types of transactions the Debt Investor's claim is to a portion of future income (from a securitized asset pool or from the collection of accounts). The grant of a security interest, or in the case of the sale of accounts receivable, mere filing of a financing statement, is used to identify the asset base out of which the income has been sold. The secured creditor's rights in this instance enable the Debt Investor to enforce its claim to the future income when it arises.

Thus, four types of investors in businesses have been identified. Each group

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different form. . . . '[P]roceeds' . . . refers to secured pre-petition personal property which is converted into some other property."); *see also In re* Cafeteria Operators, L.P., 299 B.R. 400, 410 (Bankr. N.D. Tex. 2003) (holding that lender with a blanket lien was entitled to a security interest in post-petition revenue of a restaurant as proceeds but limited such security interest in proceeds to the value of inventory subject to a pre-petition security interest which was consumed in producing such revenue). *But see* Great-West Life & Annuity Assurance Co. v. Parke Imperial Canton, Ltd. 177 B.R. 843, 853 (Bankr. N.D. Ohio 1994) ("The problem with *Northview*'s reasoning, of course, is that there is nothing in the ordinary interpretation of 'product' or 'profits' of the debtor's secured property that limits the scope of those terms to types of property that need a 'conversion' before they come into being. Conversion is the crucial element of proceeds.").

150. *See* discussion of *societas*, *supra* text accompanying notes 76-80.

151. *See supra* text accompanying note 103.

has contracted for a different status with respect to the repayment of its investment. In the first case, a security interest is used to prevent any ownership from vesting in the business. This is the most protected position, and in exchange for it, the investor trades a greater share of the business's profits. The second group grants more flexibility to the business to transfer and transform the capital invested, yet agrees with lower priority investors to a right to withdraw the amount of its original investment if those assets (or their successors in transformation) are still owned by the business (i.e. have not already been consumed or used to pay Monetary Creditors). These investors would expect a higher profit sharing relationship than the more secured investors. The third group has transformed all of its property rights in its invested capital into a joint ownership of the assets of the business. Thus, it has no specific claim to any particular capital or assets. It merely agreed to receive all distributions of any capital remaining at liquidation after all obligations of the business have been paid. The final group purchased a priority right to income produced by certain assets but did not retained any right (beyond this future income) in the assets themselves.

B. Claims to Profit Payments

A Debt Investor also has a claim to the agreed portion of future income from the business. The amount of income can take various forms ranging from a percentage of net income shared pro rata with all other investors, to a priority claim to a fixed dollar amount of profits from the business, to the revenue received from the business's use of a particular asset. As the various legal forms examined in Part II demonstrate, the natural law theory allows great flexibility in allocating the amount of profit and the timing of its payment over the life of the venture (priority of payment). It even allowed the other investors to guarantee the payment of a fixed sum of profits to one investor. If the negotiations were conducted justly, the precise amount of profit to which an investor is entitled is a function of the other terms of such agreement: priority repayment of capital, guaranty, etc.

In this light, what is labeled an interest payment on a modern loan to a business is, in the natural law analysis, the agreed amount of annual profit of the business to which the Debt Investor is entitled. If the negotiations have been justly conducted, this amount is less than the Debt Investor would expect to receive in a pro rata share of profits among all investors, because he has foregone this higher amount in exchange for a lower consistent annual payment. When the Debt Investor takes a security interest in assets of the business that secures its claim to the interest (profit) payment, the Debt Investor achieves guaranty of that return by the other investors in the *contractus trinitas*. The guaranty could be general: a guaranty from the other investors payable out of their personal wealth, what contemporary practice would call a personal guaranty, or it could be limited to the guarantor's claim to the return of capital from the same business. In other words, the security interest represents a transfer of claims of the junior investors to their share of the business's capital represented by the pledged assets to the secured Debt Investor as a guaranty for the profit payment. Thus, the secured

Debt Investor has two potential sources of payment of the agreed profit: cash profits earned by the business or the capital invested by junior investors.

There are two implications from this insight. First, the value of the secured Debt Investor's claim may increase beyond his own claim to capital repayment[152] to the extent that profit payments are not made and this second claim to profit may be secured by additional assets (named in the security agreement as collateral) but not initially allocable to the capital investment of the secured Debt Investor. The definition of collateral in the security agreement may encompass assets in excess of the capital invested and even future assets to the extent that these interests represent a transfer of the junior investors' claims on capital represented by these assets to the secured Debt Investor. Further, the secured Debt Investor's second secured claim must logically be limited to the aggregate of all junior investors' claims on capital represented by the secured assets. The implication of this limitation is that this claim to profit must rank behind the claims of Monetary Creditors. As the junior creditors who have agreed to guarantee the profit claims of the secured Debt Investors have not themselves retained a security interest to secure their own capital investment, their claims are to be paid only after the Monetary Creditors' claims. This result is consistent with the logic of the natural law theory of business investment.[153] The secured Debt Investors have agreed *with the other investors* to a guaranteed share of profits. They have not struck such an agreement with the Monetary Creditors. Unlike the claim to repayment of invested capital, this claim does not involve the retention of any ownership interest in a contributed asset. It is a claim to future property (profit). The limitation of this claim to the junior investors' claims on capital is the one lynchpin distinguishing this transaction from a mere loan of money, which would be subject to the usury restrictions on profit. There is still an element of business risk retained by the secured Debt Investor with respect to his profit claim. To the extent there is insufficient capital to realize on the guaranty given by junior investors, the claim to guaranteed profit will go unsatisfied.

As discussed in Part I, this business risk is the hallmark of capital investment. It can be shifted from one investor to another contractually, but it cannot simply be eliminated without transforming the investment into a mere money loan seeking payment of usury. If the secured Debt Investor's claim to profit were to outrank the Monetary Creditors, the risk would not just be shifted to the other investors it would be eliminated, becoming a simple payment risk. In a *contractus trinitas*, the risk that insufficient profits will be generated by the business was not eliminated, only insured by the other classes of capital investors. Absent a personal guaranty by the other investors, this insurance is limited to the other investors' capital invested. As unsecured Debt Investors and equity investors, such claims to capital are subject to payment of Monetary Creditors. Under the principle of *nemo dat*,[154] such investors cannot give a

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152. *See supra* Part III.A.

153. *See* discussion *supra* Part III.

154. *See* LYNN M. LOPUCKI & ELIZABETH WARREN, SECURED CREDIT A SYSTEMS APPROACH

greater claim than they themselves possess.

An example may usefully illustrate the implications of the preceding analysis. A business that has assets worth $300 in which the following investors have invested:

Secured Debt Investor	$100 Bond secured on all assets of the business and an annual interest coupon of 5%
Unsecured Debt Investor	$100 Debenture with an annual interest coupon of 7%
Equity Investor	$100 Common Stock

The security agreement with Secured Debt Investor prohibits any transfer of collateral without the Secured Debt Investors' consent. During the first year, the business generates $50 of accounts receivables that is securitized with Securitization Investor, who pays $45 for the right to receive all accounts receivable actually collected.[155] After conducting business for one year, the business is unprofitable and files bankruptcy for a liquidation. It has Monetary Creditors with aggregate claims of $100. No payments were made on any Debt Investor instruments because there were no profits generated. The assets, other than accounts receivable, are sold for $300 and the business has $20 of unpaid accounts receivable. As of the date of distribution, the business had collected $5 on accounts receivable (not included in the $300 figure) that had not yet been paid to Securitization Investor. The proceeds, under the theory articulated in this Article, would be distributed as follows for the reasons stated:[156]

Recipient and Amount	Reason
Securitization Investor: $5 plus whatever is eventually collected on the $20 accounts receivable	The security interest in the accounts receivable represents a right to all fruits of this asset so the $5 and whatever can be collected from the remaining.

559-60 (Aspen 5th ed. 2006).

155. For the purposes of this argument, it is not necessary to consider how the securitization is documented (a secured loan, true sale, or special purpose vehicle structure). All that is significant is that whatever legal formalities the law requires to grant a property right to the securitization investors in the proceeds of collection of the receivables constituting the pool (e.g., filing a financing statement) have been complied with.

156. In order to illustrate more clearly the principles, various transaction costs (to make the investments and achieve the liquidation of assets, for example) are treated as zero. Their introduction would alter the dollar results but not the principles of distribution.

Secured Debt Investor: $100	The security interest reserved a property right of the Secured Debt Investor in the asset up to the amount of its capital contribution and assets subject to this property right were sold in an amount at least equal to $100.
Monetary Creditors: $75	The Unsecured Debt Investor and holders of common stock did not retain an individual property interest in their capital contributed and it thus became the exclusive property of the business. They are only entitled to a share of whatever capital the business has not used in its business.
Secured Debt Investor: $5	The security interest now represents the priority claim to the distribution of remaining capital to junior investors that was allocated to guarantee the fixed profit payment of the Secured Debt Investor. This claim of the Secured Debt Investor follows the Monetary Creditors because it is a transfer of the claims of junior investors whose claim is, as discussed above, paid following Monetary Creditors.
Unsecured Debt Investors: $100	The Unsecured Debt Investor contracted for a priority return of its capital in advance of the common stock. Its interest payment represents a fixed payment of profits in priority to the common stock. As there were no profits, its claim is worth nothing. Because it did not obtain a guaranty from the junior investors, as did the Secured Debt Investors, it is not entitled to a portion of the capital of the junior investors, holders of the common stock, to satisfy its claim to profit payments.
Common Stock Holders: $20	This is the balance of capital returned.

The above example is similar to the result that would be reached under current law with three exceptions:

1. The Secured Debt Investor's claim representing unpaid interest is subordinated to the claims of Monetary Creditors;
2. The claim of the Unsecured Debt Investor to the return of principle is subordinated to the claims of Monetary Creditors; and
3. Claims to unpaid interest of Unsecured Debt Investors are subordinated to the claims to a return of initial capital of the Common Stock Holders.

Changes to the Article 9 and Bankruptcy Code priority schemes would need to be adopted to accomplish the above three changes and thus conform secured business investments to the required characteristics of the natural law understanding of capital investment, as opposed to a money loan.[157]

CONCLUSION

Despite decades of debate, academic thinking has not offered a cohesive justification for secured credit even in the commercial context. The arguments of the Efficiency Scholars appear no closer to empirical or theoretical resolution than they did in 1979. The Bad Effects Scholars have raised an intuitively appealing criticism of the current system.[158] Some participants (such as tort creditors) appear to receive too little from the current arrangement. Yet, these scholars have not offered a full normative justification for what constitutes "too little." The Property Rights Scholars have argued that an explanation of and justification for the secured credit system exists in the values of freedom of contract and property rights.[159] Although acknowledging that these values are limited by other principles, they have not considered in detail the impact of these limitations.

The natural law theory of usury and commercial investment constitutes a set of values that interacts with freedom of contract and property rights in the context of secured credit. Examination of this philosophical system illuminates the function of and limitations on the use of security in a business context.

First, the distinction between the investment of capital and claims to the payment of money creates a distinction between Investors (including Debt and Equity Investors) and Monetary Creditors (even if the form of transaction used in either category is called a loan). Debt Investors are distinguishable from Monetary Creditors by the presence of an investment decision in the business and some level of profit risk. The fully secured Debt Investor negotiates for the minimal amount of profit risk, and thus a smaller claim to profit. Although the secured Debt Investor's risk is limited by the retention of a property right in the

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157. *See* discussion *supra* Part III.

158. *See* discussion *supra* Part I.B.

159. *See* discussion *supra* Part I.C.

capital contributed, it is still subject to the risk of the loss, destruction or depreciation of value of the assets allocated to its capital as well as some risk of future profits of the enterprise. The unsecured Debt Investor has a greater risk as it has not retained this property right but has bargained for less risk than the equity holders in that its claim to return of capital has priority. The Securitization Investor has invested capital but not in the business generally. It has invested in an asset of the business, like the accounts receivable. Its risk is limited to the risk of that specific asset actually producing a return, in our example, payment of accounts. In contrast to all of these, a Monetary Creditor is merely owed a sum of money arising on account of, e.g., payment for goods or services, settlement of another type of transaction, or damages for harm caused. As a consequence, the Monetary Creditor is only entitled to its payment plus any damages caused by a delay in payment and not profit.[160] It is the presence or absence of risk of expected future profit—even small future profit—that distinguishes a Debt Investor from a Monetary Creditor.

Security interests thus serve as devices for achieving some of these forms of investment. A security interest can be created for any of the following purposes:

1. A method for reserving some of the property rights in contributed capital that entitles the holder to a right to remove its capital from the business before other claimants;
2. A method for junior investors to transfer their residual claims on capital represented by specific assets to senior investors in exchange for different profit allocations; or
3. A method to facilitate the purchase of future revenue produced from assets identified as subject to the security interest.

Thus, there is no single answer to the question of "Why secured credit." A security interest is merely a method for accomplishing a variety of forms of investment in businesses that are considered distinguishable from usurious lending, and hence just under the natural law theory of usury and capital investment. As the Property Rights Scholars assert, security interest is a property right normatively justifiable on the basis of the acceptance of property and contract rights generally.[161] Yet, this particular form of property right is created at the intersection of property law and other normative contexts, either a loan of money or an investment of capital. As instrumentalities, security interests are neither just nor unjust. Their normative justification comes from their use in these contexts. Their priority should be subject to which of the three identified functions they are serving.

Much of existing secured credit law is consistent with the natural law. Yet, some modification to the current priority system is necessary. Primarily, it would mean subordinating that portion of a secured creditor's claim to unpaid interest (or profit in the original language of the natural law) to Monetary Creditors. Because the claim to interest rests on a claim to a more or less secure claim to

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160. *See* discussion *supra* Part III.

161. *See* discussion *supra* Part I.C.

profit, there can be no claim where there is no profit. Monetary Creditors' claims are to the payment or repayment of money, and as a result, they are entitled to be paid before profit and capital guaranteeing that profit is distributed. Because the guaranty of profit represented by a security interest should be seen as a transfer of the right to capital of junior investors, this claim cannot be paid until that junior creditor is entitled to that capital. Although such a modest adjustment of priorities may not fully satisfy the intuitive objections of the Bad Effects Scholars to the treatment of certain creditors (involuntary or non-adjusting),[162] this theory does at least present a coherent normative argument for some adjustment of the results under the current priority system.

Fundamentally, secured credit in the business context is just secured credit when it remains a capital investment and is treated consistently with the natural law theory of usury and capital. When a security interest and the credit it secures ceases to be a capital investment then the transaction should be subject to usury analysis and limited to mere repayment plus damage compensation. In certain ways the current system of secured credit treats capital investments inconsistently with the distinction between capital and money and leads to unjust results in certain contexts. Yet, a few changes would conform the system more closely to the principled distinctions of the natural law theory of usury and capital.

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162. *See* discussion *supra* Part I.B.

COMPARATIVE PROCEDURE ON A SUNDAY AFTERNOON: INSTANT REPLAY IN THE NFL AS A PROCESS OF APPELLATE REVIEW

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> "In the NFL, coaches' challenges, which trigger replays, contribute to the sense that a game consists of about seven minutes of action . . . encrusted with three hours of pageantry, hoopla, and instant-replay litigation."
>
> —George Will[1]

INTRODUCTION

The use of sport as a metaphor for aspects of the legal process has a long history. Over a century ago Roscoe Pound decried the "sporting theory of justice" in his momentous speech to the American Bar Association.[2] More recently, Chief Justice Roberts famously likened the judicial role to that of a baseball umpire.[3] The instinct to draw parallels between law and sport is understandable. The litigation process, in particular, has adversaries, winners, and losers, and bears other resemblances to various games.

Not surprisingly, this extends to football. Lawyers,[4] judges,[5] and

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1. George Will, *The End of the Umpire? Foul!*, CHI. TRIB., June 19, 2008, at C27.

2. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 REP. A.B.A. 395, 404 (1906), *reprinted in* 35 F.R.D. 273, 281 (1964).

3. Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before S. Comm. on the Judiciary, 109th Cong. 55 (2005) (statement of John G. Roberts) [hereinafter Roberts Statement] ("Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire."). The metaphor predates Chief Justice Roberts. *See* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1033 (1975). For a critique, see Chad M. Oldfather, *The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions*, 27 CONN. L. REV. 17, 42-46 (1994) [hereinafter Oldfather, *The Hidden Ball*].

4. *See, e.g.*, Waugh v. Williams Cos., Inc. Long Term Disability Plan, 323 F. App'x 681, 684 n.2 (10th Cir. 2009) (noting claimant's contention "that the level of deference a court should give a plan administrator's decision is the same deference that a football official reviewing an instant replay in a booth should give to a call made by the on-the-field official").

5. *See, e.g.*, Finnsugar Bioproducts, Inc. v. Amalgamated Sugar Co., 244 F. Supp. 2d 890, 893 (N.D. Ill. 2002) ("Even under the more relaxed rules that govern pro football, however, the Court notes that Finnsugar would have exhausted its opportunities for further review of this issue

commentators have noticed and drawn upon the similarities between appellate review and instant replay review in the National Football League (NFL). One senses delight, for example, in Seventh Circuit Judge Terrence Evans' opinion for the court reversing a ruling of then-Chief Judge Richard Posner (who had been sitting as a district judge by designation) in *Bankcard America, Inc. v. Universal Bancard Systems, Inc.*[6] The opinion began:

> Football fans know the sickening feeling: your team scores a big touchdown but then a penalty flag is tossed, wiping out the play. Universal Bancard Systems, Inc. knows that feeling firsthand after seeing not one, but two big touchdowns called back. The referee who waved off the first—a $7.8 million verdict—and then the second—a $4.1 million jury verdict after a second trial—was the Honorable Richard A. Posner, the circuit's chief judge who in this case was wearing, by designation, the robe of a district judge. Like the instant replay official, we now review the decisions of our colleague—using the voluminous record rather than a television monitor and recognizing that our review in 1999 of a case that began in 1993 is a far cry from instant.[7]

Indeed, one state bar association president exhorted his colleagues to use replay review as a teachable moment, part of "our platform for discussing how the system of justice really works and its importance to our society, as well as the

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long ago."); United States v. Eckhoff, 23 M.J. 875, 881 (N.M. C.M.R. 1987) (Cassel, J., concurring) ("For while the decisions in the appellate process are similar to those made in deciding the application of rules in a professional football game (well-matched and well-trained teams with plenty of expert assistance and the type of action which can be played and considered in discrete periods with the availability of the instant video replay), the trial judge is more like the referee in a youth basketball game where the motion is continuous, the players of varying degrees of ability and training, and there is no way to examine and reexamine each call; there is no need for us to add to the already present needless and distracting heckling."), *judgment rev'd in part*, 27 M.J. 142 (C.M.A. 1988); Johnson v. Frazier, 787 A.2d 433, 436 (Pa. Super. Ct. 2001) ("Like an instant replay challenge in professional football, the appeal was made before the next play began; the challenge must be resolved before another play may be validly run. 'After further review,' we find the call on the field must be reversed."); Vaccaro v. Joyce, 593 N.Y.S.2d 913, 916 (Sup. Ct. 1991) ("[T]he problem, as frequently occurs in many sporting events, is whether primacy is to be given to correctness or to finality. A football official may rule that, in accordance with his interpretation of the rules as to when the ball is dead a touchdown has not been scored, and even though replays on the next day show that his call and his interpretation of the rules was clearly incorrect, once everybody has gone home the game is over and the result stands.").

6. 203 F.3d 477 (7th Cir. 2000).

7. *Id.* at 479 (footnote omitted); *see also* NFL Players Ass'n v. Pro-Football, Inc., 857 F. Supp. 71, 72 (D.D.C. 1994) ("The parties normally rely upon an arbitrator to act as a referee when disputes arise, but in this particular case, the Court is forced to don a black and white striped shirt and interpret the rules by which the parties have agreed to be bound."), *vacated in part on reh'g*, 79 F.3d 1215 (D.C. Cir. 1996).

important role lawyers and judges play."[8] He urged lawyers to use replay review, and the "indisputable visual evidence" standard that it incorporates,[9] "as an opportunity to explain how similar burden of proof standards exist in the law, that not all mistakes can be corrected, that the system has inherent limits, but that it is the best system yet devised."[10]

The analogy is, to a point, a good one. The NFL's replay review process does resemble appellate review in the courts. The underlying goal—correcting mistakes by the initial decisionmaker—overlaps with one of the core functions of appellate review.[11] The NFL's "indisputable visual evidence" standard is nothing less than a standard of review.[12] One can tease out other similarities between the two mechanisms at varying levels of generality and abstraction. The suggestion that replay review provides a good illustration of some of the basic features of appellate review makes sense.

Of course, just as metaphors and analogies serve to illuminate similarities between the two points of comparison involved,[13] they also serve to obscure.[14] By drawing our attention to similarities, they can lead us to overlook differences.[15] Moreover, reliance on a metaphor can lead to shifts in understanding of the underlying subject as the metaphor triggers associations with ideas previously regarded as unrelated.[16] To the extent that there are fundamental differences between the two processes under consideration here—and there are—it is important to understand the differences in order to use the analogy thoughtfully.

Such consideration is particularly appropriate given the increasing prevalence of video evidence.[17] Cameras are everywhere, not only mounted in squad cars and bank lobbies but also carried in the pockets and purses of millions of citizens.[18] Events that in the past could be reconstructed only through oral testimony are often recorded and preserved. Courts find themselves with the ability to quite literally watch replays. As they do, some judges will undoubtedly

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8. Joseph G. Bisceglia, *CSI, Judge Judy and Civic Education*, 95 ILL. B.J. 508, 508 (2007).

9. *See infra* Part II.A.3.

10. Bisceglia, *supra* note 8, at 509.

11. *See* Chad M. Oldfather, *Error Correction*, 85 IND. L.J. (forthcoming 2010) (on file with author) [hereinafter Oldfather, *Error Correction*].

12. Standards of review "function not to compel a particular disposition of a given case, but rather to fix the relationship between, and allocation of power among, the appellate and trial courts." Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437, 504 (2004) [hereinafter Oldfather, *Appellate Courts*].

13. *See* Oldfather, *The Hidden Ball*, *supra* note 3, at 22-23.

14. *See* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 10-13 (1980).

15. *See* Oldfather, *The Hidden Ball*, *supra* note 3, at 24-25.

16. *Id.*

17. *See, e.g.*, Howard M. Wasserman, *Orwell's Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600 (2009) (noting the increased use of recording technology by the State and its citizens).

18. Sean Dodson, *A Cheap Camcorder in Every Pocket*, GUARDIAN, Sept. 4, 2008.

draw on the analogy between themselves and the instant replay official.

This Article seeks to lay the groundwork for the responsible use of this analogy by illumination of features of both processes through consideration of the similarities and differences between them. But that is not all. There is more to be gleaned here than the fruits of exploring an analogy. The Article is also a product of the same sort of impulse that underlies comparative inquiries focused on two legal systems. The purposes of comparative inquiry can be described in quite high-minded terms:

> The historical origins of the classifications known to any system, the relative character of its concepts, the political and social conditioning of its institutions, all these are really understood only when the observer places himself outside his own legal system, that is to say when he adopts the perspective of comparative law.[19]

We are mindful that the point of comparison is a game rather than another country's legal system. Yet it would not be an overstatement to suggest that the results of the replay review process can be as consequential to the parties involved as the resolution of many lawsuits. The NFL is big business.[20] Careers may be at stake, as may a team's playoff fortunes, which in turn may affect the team's financial health as well as the psychic health of its fans. As a result, there are benefits to this analysis. The inquiry was enjoyable to undertake (and will hopefully be enjoyable to read), but more than that, the comparison of appellate review to the use of instant replay can provide a fresh perspective on the appellate process. That comparison illustrates not only some of the more discrete components of the appellate process (such as standards of review), but also facilitates the exploration of broader themes such as the ways in which decision-making processes and institutions must accommodate a variety of competing interests and considerations and the limitations and difficulties of rule-based constraints on decisionmakers.

The remainder of this Article proceeds as follows: Part I provides a brief overview of the processes of replay review in the NFL and appellate review in

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19. RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 5 (3d ed. 1985).

> Objectives as varied as aiding law reform and policy development, providing a tool of research to reach a universal theory of law, giving a critical perspective to students and an aid to international law practice, facilitating international unification and harmonisation of laws, helping courts to fill gaps in the law and even working towards the furthering of world peace and tolerance have been attributed to comparative law.

Id.; Esin Örücü, *Developing Comparative Law*, *in* COMPARATIVE LAW: A HANDBOOK 44 (Esin Örücü & David Nelkin eds., 2007); *see also* PETER DE CRUZ, COMPARATIVE LAW IN A CHANGING WORLD 18-25 (3d ed. 2007) (identifying and discussing five functions of comparative law: (1) "as an academic discipline," (2) "as an aid to legislation and law reform," (3) "as a tool of construction," (4) "as a means of understanding legal rules," and (5) "as a contribution to the systematic unification and harmonisation of law").

20. *See* GEORGE H. SAGE, POWER AND IDEOLOGY IN AMERICAN SPORT 138-39, 154 (1990).

the legal system. Part II explores some of the particulars of the analogy, including both similarities—the reliance on adversarialism, a concern with error correction, and the use of standards of review—and differences—the immediate context in which review takes place, the scope of review, and the existence of a lawmaking function. Part III takes up some of the broader themes illustrated by the comparison including the role of institutional competence in a review mechanism, the effect of systemic considerations, and the difficulty of achieving perfect constraint through rules. The Article concludes by considering the perils of over-reliance on the analogy between the two processes.

I. AN OVERVIEW OF THE TWO PROCESSES

The review process in the NFL as well as appellate review in the American judicial system has developed over time. The current rules and procedures of each system, in some degree, can be traced to the processes that were originally used for review.

A. A Brief History of Instant Replay in the NFL

Ron Rivera was livid. After the Chicago Bears[21] held the Green Bay Packers to a single touchdown for fifty-nine-and-a-half minutes of the game, Rivera's team was a quarterback kneel-down away from victory after officials penalized Packers quarterback Don Majkowski for an illegal forward pass on fourth down.[22] Had Majkowski not crossed the line of scrimmage, his touchdown pass to Sterling Sharpe (and the ensuing extra point) would have given the Packers a one point lead with thirty-two seconds remaining.[23] However, instant replay official Bill Parkinson had the benefit of watching the play multiple times in slow motion.[24] What he saw was that line judge Jim Quirk made the incorrect call; Majkowski's foot did not cross the line of scrimmage.[25] After four minutes of review, Parkinson reversed the call and the Packers went on to win the game, 14-13.[26]

Though the call was correct, Rivera was upset with the use of the replay system. "I can't wait for them to get rid of instant replay. . . . They have definitely taken out human error and the human nature of football. It's out. We might as well just put robots in the football game and let them play."[27]

Rivera was not alone in his criticism of the NFL's instant replay system. The

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21. The reader will note that this Article is devoid of any references to the Minnesota Vikings. That is because the senior author has been around long enough to know that the Vikings will always disappoint in the end and need no help from botched officiating to do so. Of course, the junior author is a Chicago Cubs fan, and thus knows a little bit about such disappointment.

22. Fred Mitchell, *Picture Fuzzy to Bears*, CHI. TRIB., Nov. 6, 1989, at C1.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

NFL owners voted to adopt a limited form of instant replay in 1986 in an attempt to eliminate egregiously bad calls.[28] Under the original replay system, a designated replay official had the sole discretion to review each play on a monitor and to order non-judgment calls reversed if he found "indisputable" evidence that the on-field call was incorrect.[29] This format gave total control to a single official, as neither the teams nor the referees could call for a replay of a disputed call.

Although the system was utilized for six years, the NFL owners opted to cancel the replay option in March 1992 after complaints that the system was arbitrary and "cumbersome."[30] There was no limit on the number of plays that could be reviewed or the length of the reviews.[31] Furthermore, because the replay official relied exclusively on camera angles provided by the television broadcast of the game, network executives felt that the NFL was compromising the independence of the broadcast.[32] Most damning of all, several correct on-field calls were erroneously reversed by the replay official.[33]

Instant replay eventually returned after several controversial calls marred the 1998 NFL season. Some of the more embarrassing examples: during a Thanksgiving game between the Detroit Lions and the Pittsburgh Steelers, the officials incorrectly awarded the coin toss to the Lions (although it is unclear if replay could have helped); the Seattle Seahawks were denied a playoff spot after the referees awarded a "phantom touchdown" to New York Jets quarterback Vinny Testaverde; and the Green Bay Packers were eliminated from the playoffs when an official erroneously called San Francisco 49ers wide receiver Jerry Rice down by contact when he had, in fact, fumbled the ball.[34] With fans decrying the injustice of so many incorrect calls, the owners voted overwhelmingly to reinstate instant replay during the spring of 1999.[35]

The revised replay system that returned to the NFL in 1999 had some important distinctions from the 1986-1991 version. Most importantly, the plenary power of the replay official was largely devolved to coaches. Under the new system, a coach initiates a challenge by using a timeout; if he is vindicated,

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28. Michael Janofsky, *New N.F.L. Replay Rule Stirs Debate*, N.Y. TIMES, Mar. 13, 1986, at B14.

29. *Replay the Replay*, N.Y. TIMES, Sept. 25, 1986, at A30.

30. Aaron R. Baker, *Replaying Appellate Standards of Review: The NFL's "Indisputable Visual Evidence": A Deferential Standard of Review*, 16 TEX. ENT. & SPORTS L.J. 14, 14 (2007) (citation omitted).

31. *Id.*

32. Michael Goodwin, *Instant Replay Rule Troubles Networks*, N.Y. TIMES, Oct. 11, 1986, at A19.

33. Tim Green, *Replay's Back and There's Going to Be Trouble—Again*, USA TODAY, Sept. 10, 1999, at 13F.

34. Baker, *supra* note 30, at 14-15.

35. Thomas George, *N.F.L. Backs Limited Replay After Complaints of Bad Calls*, N.Y. TIMES, Mar. 18, 1999, at A1.

the challenging coach gets his timeout back.[36] Originally, the coach only had two challenges to use per game; the rule has since been revised to give a coach a third challenge if he is successful on his first two challenges.[37] NFL coaches must judiciously use their timeouts because a coach may not initiate a challenge if he does not have a timeout.[38]

The replay official in the upstairs booth was retained, but in a limited form. Instead of giving the booth official the power to review any call he thought was questionable, the owners decided to limit the replay monitor's discretion to the last two minutes of each half.[39] This system forces coaches to be invested in the system by punishing a coach who makes an erroneous challenge with the loss of a timeout. However, it also allows coaches to focus on strategy and not video monitors in the final two minutes of each half.

The other big change from the earlier version of instant replay was that owners instituted a time limit for reviews. Originally, the limit was ninety seconds, before being reduced to sixty seconds in 2006.[40] The NFL wanted to avoid the mistakes of the past replay system where the replay official could unilaterally cause long delays in the middle of a game. By placing a check on officials, the owners ensured that replay would not significantly interrupt the pace of the game.

In 2007, NFL owners voted to make instant replay a permanent fixture in the NFL.[41] The current rules allow officials to review the following non-judgment calls: if a runner broke the goal line plane; if a pass was completed or intercepted; if a player remained in bounds; if a player recovered a fumble in bounds; if an ineligible player touched a forward pass; if a quarterback's forward motion was a pass or a fumble (the "Tuck Rule"[42]); if a player crossed the line of scrimmage before throwing a pass; whether a pass was thrown forward or behind the line of scrimmage; if a player was ruled not down by defensive contact; forward progress (only with respect to a first down); if a kick was touched; if there were more than eleven players on the field; kick attempts where the ball is lower than the top of the uprights at the point it crosses the goal post; or if there was an illegal forward handoff.[43] In addition to judgment calls such as pass interference and holding, non-reviewable calls include: status of the clock; what the current down is; forward progress not related to a first down or touchdown; fumbles; or kick attempts where the apex of the football is above the

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36. NFL Rules, R. 15, § 9.

37. Damon Hack, *Clarett's Suit Against the N.F.L. Is Headed to the Court of Appeals*, N.Y. TIMES, Mar. 31, 2004, at D4.

38. NFL Rules, R. 15, § 9.

39. *Id.*

40. Joe Starkey, *Silent Count Crackdown*, PITT. TRIB.-REV., Aug. 5, 2006.

41. John Clayton, *Picture This: Instant Replay Here to Stay*, ESPN.COM, Mar. 28, 2007, http://sports.espn.go.com/nfl/columns/story?columnist=clayton_john&id=2815186.

42. Mark Maske, *Tuck Rule Hard to Grasp*, WASH. POST, Oct. 15, 2005, at E1.

43. NFL Rules, R. 15, § 9.

uprights when the ball reaches the cross bar.[44]

The NFL has thus restrained the scope and power of referees in the context of instant replay. Only a coach can initiate a challenge in the first twenty-eight minutes of a half. After that, a replay booth official has total discretion. Additionally, certain calls, specifically judgment calls, cannot be reviewed.[45] This is because judgment calls are inherently subjective, and thus the official reviewing the call on a replay monitor would ultimately substitute his judgment for that of the official who made the original call. The rationale for bringing back replay was to eliminate egregious mistakes, not subjective calls.

Finally, the NFL expects that officials viewing a replay monitor will extend great deference to the original call. The NFL Rulebook explicitly states that a call should only be reversed "when the Referee has *indisputable visual evidence* available to him."[46] Thus, the original call must be given great deference. This review standard arguably protects the institutional integrity of officiating by ensuring that animosity does not cultivate amongst crews, and that referees do not have to fear that any call they make could be reversed. The limit on the number of challenges also serves to protect referees from embarrassment.

B. A Thumbnail Sketch of the Appellate Process

A brief review of the typical appellate process in American courts reveals why the analogy to replay review seems fitting. An appeal, of course, arises out of an underlying lawsuit. Although lawsuits are not standardized and vary in their particulars from one jurisdiction to the next, among subject matters, and even from trial judge to trial judge, there are common features. As a case progresses, the parties will have made various assertions, denials, and defenses, many of which will result in rulings from the trial judge. The party on the losing side of any one of these rulings will often object to the judge's decision and want to have it reviewed.

Of course, not every ruling made by a trial judge can be reviewed, at least not immediately. There are preconditions that must typically be satisfied.[47] The claimed error must have been raised at the trial court.[48] As a general proposition,

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44. *Id.*

45. *Id.*

46. *Id.*

47. In one judge's formulation:

> For a reviewing court to determine that there is reversible error, three critical prerequisites must be implicated in the judicial error-correcting process. It is necessary that there be (a) specific acts or omissions by the trial court constituting legal error, (b) properly suggested as error to the trial court, and (c) if uncorrected on that level, then properly presented for review to the appellate court.

Pfeifer v. Jones & Laughlin Steel Corp., 678 F.2d 453, 457 n.1 (3d Cir. 1982) (Aldisert, J.), *judgment vacated*, 462 U.S. 821 (1983).

48. "[I]n general, attorneys must raise an issue in the trial court, and sometimes take specific steps indicated in common law and in codified rules such as the applicable rules of civil procedure

there must be a final judgment from the trial court before any of its rulings can be reviewed,[49] the party seeking to appeal must have standing, and an appeal must not be moot.[50] More broadly, "an appellate court can be activated only pursuant to a rather elaborate array of rules deriving from statutes, court-made doctrines, written rules of procedure, or some combination of these."[51]

There are exceptions. The justifications for the final judgment rule, which are largely based in considerations of efficiency,[52] do not justify delayed review in every situation. Sometimes it is more efficient, and more fair, to allow for an immediate appeal.[53] These are interlocutory appeals, and American jurisdictions vary greatly in the extent to which they are allowed.[54] In addition, parties are sometimes able to obtain review before a final judgment by way of the extraordinary writs or via procedures allowing for review at the discretion of the appeals court.[55] In operation, these requirements result in a system in which appeals take place at differing stages in a lawsuit's progression. The grant of a motion asserting that the plaintiff has failed to state a claim upon which relief can be granted can result in an appeal at the earliest stages of a lawsuit, while other cases might progress through trial before there is an appeal.

Still more restrictions apply to an appeal that has cleared all these hurdles. There are limitations on the extent of appellate review. The first, scope of review, relates to the breadth of the appellate court's inquiry. As a general matter, the appellate court may only consider things already in "the record" which consists of the information brought before the trial court.[56] There are limited exceptions to this,[57] but for the most part appellate courts are restricted to using the information presented in the trial court to resolve issues first raised in the trial court.[58] The second, standard of review, concerns the depth of the

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and of evidence, to make that issue eligible for consideration by the appeals court." DANIEL J. MEADOR ET AL., APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL 34 (2d ed. 2006).

49. 28 U.S.C. § 1291 (2006).

50. *See* Nat'l Treasury Employees Union v. United States, 101 F.3d 1423, 1427-28 (D.C. Cir. 1996).

51. MEADOR ET AL., *supra* note 48, at 33.

52. *See* DANIEL JOHN MEADOR & JORDANA SIMONE BERNSTEIN, APPELLATE COURTS IN THE UNITED STATES 45-46 (1994) (listing the avoidance of piecemeal review, the possibility that the complaining party will ultimately prevail, and the desirability of not disrupting the trial judge in the management of the case as the justifications).

53. *Id.* at 49.

54. *Id.*

55. *Id.* at 51-52.

56. *Id.* at 55.

57. *Id.* at 55-56 (identifying those exceptions as consisting of facts of which the court may take judicial notice and "a fact not in the record that is conveyed by counsel during oral argument and not disputed by opposing counsel").

58. There are, not surprisingly, more exceptions to this. Appellate courts sometimes raise issues "sua sponte," and will also relax the requirement that issues have been raised to the trial court

appellate court's review, and may also be regarded as concerning the level of deference to which the trial court's ruling will be entitled. These vary depending upon the type of ruling being reviewed. As a general matter, trial court rulings on questions of law receive no deference, but trial court and jury determinations of fact are entitled to a great deal of deference.[59] Additionally, there are decisions that are committed to the discretion of the trial judge. This discretion is never absolute, and such decisions are reviewed for "abuse of discretion," a standard that varies from one context to another.[60]

An appeal can be regarded as involving an independent, derivative dispute.[61] The parties submit briefs, there is often an oral argument before the appellate court, and the court typically issues a written opinion justifying its decision. Depending on the court's resolution and the stage in the case at which the appeal arose, the appellate court's decision might bring an ultimate conclusion to the lawsuit, or might result in it being remanded to the trial court. If remanded, the case might resume where it was left off, effectively start all over again, or require the determination of new sets of issues.

II. ASSESSING THE ANALOGY

There is a reason that judges and commentators have drawn the connection between replay review and the appellate process—in a basic sense, the analogy works. Both processes involve review of a ruling made by an initial decisionmaker, and both place constraints on the ability of the second decisionmaker to reverse the decision of the first. Many of the features of the replay review process have direct counterparts in the processes of appellate courts. But there are, unsurprisingly, significant differences, too.

This Part examines some of the similarities and differences between the two processes. As the analysis will reveal, whether a feature of the two processes constitutes a similarity or a difference depends to a significant degree on the level of generality at which the assessment takes place.

A. Notable Similarities

Although obvious differences abound, the appellate review process conducted by American courts often overlaps the job of an NFL official viewing a replay of a previous play.

1. Adversarialism and the Preservation of Error.—The NFL replay system and the appellate process both arise out of an adversarial process. As the prevalence of the "law as sport" metaphor[62] attests, litigation and football each involve two parties engaged in a struggle in which there will be a winner and a

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in cases of "plain error." *Id.* at 56-57.

59. *Id.* at 59-64. There are also mixed questions, which arise when the question under consideration requires the application of a legal standard to a given set of facts. *Id.* at 64-65.

60. *Id.* at 65-68.

61. Oldfather, *Error Correction*, *supra* note 11.

62. *See supra* notes 2-10 and accompanying text.

loser.[63] This extends to the process of triggering review: one party must challenge the initial decision. Parties to a lawsuit must object, make a motion, or otherwise prompt a ruling from the trial court. After a party takes the steps necessary to preserve a claim of error, the party must then file an appeal at the appropriate time. The process in the NFL is somewhat less involved. Aside from the final two minutes in each half, an NFL coach must challenge an on-field call for a referee to engage in the instant replay review process.[64] This entails the coach tossing a red flag on the field and telling the crew chief what aspect of the prior play the coach seeks to challenge.[65]

Moreover, in both settings a challenge must be initiated within a designated time period or it will be lost. Litigants must raise pretrial contentions within prescribed time periods,[66] trial objections must be "timely,"[67] and appeals must be filed within a fixed period following a final judgment.[68] These requirements are a product of a number of considerations, including the desirability of drawing the attention of the trial judge and the opposing party to the issue (to allow for the possibility that an error can be corrected without the need for an appeal), as well as facilitating finality by closing off the possibility of review for issues that have not been raised in a timely manner.[69] Considerations of finality and

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63. Of course, even at this basic level the analogy breaks down. Football is generally a zero-sum game (one could imagine a scenario in which a spot in the playoffs turned on a team's overall point differential, such that a team might lose a game but still obtain a playoff spot for itself by minimizing the size of the loss, *see* NFL Tie Breaking Procedures, http://www.nfl.com/standings/tiebreakingprocedures (last visited Oct. 11, 2009), but this is the rare exception.) Litigation is less so. A lawsuit can settle on terms that represent a compromise, a jury might reach a compromise verdict, and so forth.

64. NFL Rules, R. 15, § 9.

65. Curiously, the rules do not expressly provide for any challenge mechanism. Nonetheless, whatever the source of the requirement, flag-tossing is the prescribed method. *See* Judy Battista, *He Who Hesitates Is Lost, Miami's Coach Acknowledges*, N.Y. TIMES, Sept. 9, 2006, at D6.

66. *See, e.g.*, FED. R. CIV. P. 12.

67. FED. R. EVID. 103(a)(1).

68. *E.g.*, FED. R. APP. P. 4(a)(1)(A).

69. One professor summarized as follows:

> There are several reasons for the preservation of error requirement. First, it gives the trial court the opportunity to resolve the issue and determine the prejudicial consequences of the objection, frequently obviating the need for appellate review. Second, a preserved objection gives the appellate court a complete record upon which to base its decision. Third, the preservation rule encourages competent and vigilant performance by the trial attorneys. Fourth, the rule recognizes the unfairness to the winning party at trial of reversing a judgment on the basis of arguments not addressed at trial. Fifth, it avoids sandbagging or concealment by trial counsel to withhold possible reversible errors until the appeal. Sixth, the preservation requirement promotes efficient judicial administration because it results in fewer new trials or remands for further proceedings. Seventh, the preservation requirement encourages finality and trust in litigation. Eighth, it prevents ad hoc decision making. Moreover, appellate courts

practicality likewise drive the process in the NFL. There a challenge must be initiated before the snap of the next play, and will be lost if it is not.[70] The effect is that the NFL's system is one in which all review is interlocutory. Once the game is over the result is final, and no subsequent determination that a call was erroneous will change that result. Thus, the remedial power of the reviewing official is limited to the result of the preceding play. This is to ensure that the rhythm of the game is not disrupted.

There is a lesson in the evolution of the NFL's system. In its original incarnation, instant replay used an essentially sua sponte process in which review was conducted entirely at the discretion of the replay official, with no input from the teams. This proved to be unsatisfactory, and the frustration that resulted is consistent with theories of procedural justice that suggest that opportunity for input is critical to the perceived legitimacy of such a process among potentially affected parties.[71] Indeed, some have raised concerns that replay officials have too much discretion in the final two minutes of a half.[72] Unless the replay assistant located in the coaches' booth or press box determines that a call merits a full review, the head coaches and on-field officials are powerless to initiate review.[73] Much consternation was caused when Kurt Warner's last second fumble in Super Bowl XLIII was not given a booth review.[74] The League's explanation was that Bob McGrath, the replay assistant, had additional time to review the play because of an unsportsmanlike conduct penalty and determined that no official review was needed.[75] The replay system in essence becomes sua sponte in the last two minutes of each half, and thus deprives head coaches of any power over the process. The same dynamic exists in the appellate process. One hears echoes of these critiques in those directed at sua sponte review by appellate courts,[76] as well as in lawyers' frustration with courts' failure more generally to

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are reluctant to vest original jurisdiction over unpreserved matters.

Derrick Augustus Carter, *A Restatement of Exceptions to the Preservation of Error Requirement in Criminal Cases*, 46 U. KAN. L. REV. 947, 950 (1998) (footnotes omitted).

70. In a September 2006 game, then-Dolphins coach Nick Saban attempted to challenge a touchdown reception by Pittsburgh's Heath Miller. He threw the flag before the extra point attempt, but it was too late for the officials to see it, and accordingly Saban lost the ability to mount what would have been a successful challenge. *See* CBS Sportsline.com Wire Reports, *Batch Fills in for Big Ben, Leads Steelers Over Dolphins*, CBS SPORTS.COM, Sept. 7, 2006, http://www.cbssports.com/nfl/gamecenter/recap/NFL_20060907_MIA@PIT.

71. For a consideration of the connection between instant replay and procedural justice, see Jerald Greenberg, *Promote Procedural Justice to Enhance Acceptance of Work Outcomes*, *in* THE BLACKWELL HANDBOOK OF PRINCIPLES OF ORGANIZATIONAL BEHAVIOR 181, 190 (Edwin A. Locke ed., 2000).

72. Peter King, *MMQB Mail: Explaining the Warner Review; Defending Best Game Tag*, SI.COM, Feb. 3, 2009, http://sportsillustrated.cnn.com/2009/writers/peter_king/02/03/wrapup/.

73. NFL Rulebook, R. 15, § 9.

74. King, *supra* note 72.

75. *Id.*

76. *See, e.g.*, Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua*

be responsive to their arguments.[77]

Finally, both systems temper the contestants' adversarial impulses by placing some risk on the party seeking to challenge a ruling. The defeated party in a legal appeal must invest time and money and faces assorted other risks including the generation of an unfavorable precedent or the imposition of sanctions in the event of a frivolous appeal. The NFL coach who incorrectly believes the initial call was wrong loses a timeout and limits his ability to challenge additional calls.[78] Both systems thus provide incentives for the parties to police themselves and thereby increase the likelihood that appeals are meritorious.

2. A Primary Concern with Error Correction (Including Mechanisms Designed to Limit the Number of Appeals).—At least insofar as the point of comparison is review by an intermediate court, both processes are concerned primarily with the correction of errors by the initial decisionmaker. Indeed, considered from a historical perspective the basic architecture of the U.S. judiciary rests on the understanding that appellate courts serve no purpose other than policing for lower court errors.[79] Although the "simple minded formalism"[80] underlying that conception of the appellate role has long since gone out of fashion, many intermediate appellate courts still purport to regard themselves as engaged exclusively in the process of error correction.[81] What is more, many commentators have suggested that all intermediate courts ought to regard this role as their primary function.[82] Even when one accounts for appellate courts'

Sponte Decisions by Appellate Courts, 69 TENN. L. REV. 245 (2002).

77. *See, e.g.*, Mary Massaron Ross, *Reflections on Appellate Courts: An Appellate Advocate's Thoughts for Judges*, 8 J. APP. PRAC. & PROCESS 355, 362 (2006).

78. If the comparison seems absurd, understand that NFL coaches guard time outs like their children. See Dave Anderson, *Replay Instant Replay*, N.Y. TIMES, Mar. 11, 1997, at B11, which notes that Bill Parcells was opposed to reinstituting instant replay because the challenge option required a team to first use a time out. According to Parcells, "Time outs are precious. I don't see what one has to do with the other." *Id.*

79. For a more thorough discussion of this point, see Oldfather, *Error Correction*, *supra* note 11.

80. The phrase is Paul Carrington's. *See* Paul D. Carrington, *The Function of the Civil Appeal: A Late-Century View*, 38 S.C. L. REV. 411, 416 (1987).

81. *See, e.g.*, State v. Rodriguez, 738 N.W.2d 422, 432 (Minn. Ct. App. 2007) ("The task of extending existing law falls to the supreme court or to the legislature, but it does not fall to this court. . . . Our analysis is consistent with our role as an error-correcting court and describes what we believe to be the current state of the law." (citation & footnote omitted); *In re* Grand Jury Subpoena Duces Tecum Directed to Keeper of Records of My Sister's Place, No. 01CA55, 2002 WL 31341083, ¶ 22 (Ohio Ct. App. Oct. 9, 2002) ("By and large, courts of appeal in Ohio function in an error correction capacity. We leave the creation of public policy to the legislature and the Supreme Court.").

82. *See, e.g.*, Stephen B. Burbank, *Judicial Accountability to the Past, Present and Future: Precedent, Politics and Power*, 28 U. ARK. LITTLE ROCK L. REV. 19, 21 (2005); Paul D. Carrington, *Justice on Appeal in Criminal Cases: A Twentieth Century Perspective*, 93 MARQ. L. REV. (forthcoming 2009) (on file with author).

law creation role, it seems clear that the overall institutional mission can be characterized as some version of attaining improved results, whether gauged in terms of the trial court's application of legal rules to a case or in terms of determining the most appropriate legal rule.[83]

The error correction mission of replay review is more apparent, and is quite clearly the predominant, if not the sole, rationale for the mechanism. The question facing an NFL referee viewing a replay of a challenged play is simply whether the initial call was correct. Because the rulings subject to review almost exclusively involve what are quite literally bright-line determinations, the question of what constitutes error is considerably less open to interpretation than is the case in the legal system.[84] Thus, making a ruling on whether a play stands should be simple: mere application of the relevant rule to the given situation, with the aid of slow motion replay and multiple camera angles. If this is inconclusive, "indisputable visual evidence" does not exist and the original call must stand. Nor must the replay official concern himself with how the ruling will affect future cases: an official who overturns an on-field call does not write an opinion, does not create precedent, and has no influence over the interpretation of the rules. Indeed, the NFL's director of officiating will occasionally admit when referees make incorrect calls.[85] In theory, and with respect to most calls, NFL officials are to operate as automatons. The NFL rulebook does not offer any room for compromising in that each official is expected to reach the proper conclusion according to the rules.

This is not to suggest that NFL officials are not forced to rely on their judgment. The process of officiating a game during live action constantly requires referees to use their judgment to make split second decisions. Additionally, certain penalties such as holding or pass interference are called differently from week to week, and from one officiating crew to the next, in part because of leeways inherent in the applicable rules and also because officials do not have the luxury of witnessing each play at a leisurely pace.[86] Although the league goes to great lengths to foster uniformity in the way these penalties are

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83. *See* Oldfather, *Error Correction*, *supra* note 11.

84. *Id.* This is not to suggest that there is no room for interpretation, or that the replay review system is infallible. Despite the bright lines on the field, camera angles provide a perspective on reality that is different from reality, and the interpretation of the resulting video introduces an opportunity for subjectivity to generate further distortions.

85. *See* Gary Mihoces, *NFL Admits Mistake in Steelers Game; Error Costly to Gamblers*, USATODAY.COM, Nov. 18, 2008, http://www.usatoday.com/sports/football/nfl/steelers/2008-11-17-score-mistake_N.htm; Associated Press, *NFL Admits Mistakes in Hawks Win Over Giants*, SEATTLETIMES.NWSOURCE.COM, Nov. 28, 2005, http://seattletimes.nwsource.com/html/sports/2002652274_webhawks28.html; Michael David Smith, *NFL Admits Mistakes on Terrell Owens, Bubba Franks Force-Out Catches*, NFL.FANHOUSE.COM, Oct. 17, 2007, http://nfl.fanhouse.com/2007/10/17/nfl-admits-mistakes-on-terrell-owens-bubba-franks-force-out-cat/.

86. The rules also include some grants of broad discretion to officials. For example, if non-players enter the field and interfere with play, "the Referee, after consulting with his crew . . . , shall enforce any such penalty or score as the interference warrants." Rule 17, § 1, art. 1.

called,[87] it acknowledges and accepts some inconsistency. That may be necessary. The use of replay to review such calls would undoubtedly generate *different* results, but not necessarily better results. Pass interference, for example, is to some degree in the eye of the beholder. As a result, the set of calls generated via the use of replay would, to a large degree, serve only to substitute one set of officials' standards for those of another. This effect would likely swamp any tendency toward greater accuracy in the aggregate,[88] thereby making the benefits of review not worth the costs.

The NFL's replay regime, then, offers a glimpse at a pure error correction system. The regime's mechanisms are focused on ensuring that review is available only in situations where it holds the promise of leading to a better result than the one reached on the field, and that when it is available a call will only be reversed if it is clear that reversal is the better outcome. NFL replay does not provide for review in situations where review would not improve upon the quality of calls, nor does exercise of the review mechanism lead to the creation or refinement of the rules involved.

This is not to suggest that there is a single, ideal-type of error correction review mechanism of which replay review is an exemplar. One can imagine many variants of the NFL's system that would still be best characterized as involving only error correction,[89] and in any event the functions of review are not mutually exclusive and the various features of a process of review may serve multiple ends. The point instead is simply to set up a contrast between a review mechanism with a clear focus on error correction and the more mixed process of appellate review.

An appellate regime devoted to error correction to the same extent as replay review would look radically different from the system we have. Review would be limited to rulings as to which the trial court lacks discretion, such as with respect to the admission of a witness' prior crimes involving falsehood or dishonesty under Federal Rule of Evidence 609(a)(2), or perhaps to the category of cases dealt with as involving "clear" or "plain" error. More generally, such a transformation would seemingly require a larger shift to a legal system patterned on a civil law model, in which legislatures generate detailed legal codes that courts apply on a case-by-case basis with no implications for future cases.[90]

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87. Telephone Interview with Derrick Crawford, Counsel for Policy and Litigation, NFL (May 11, 2007) [hereinafter Crawford Telephone Interview].

88. However much judgment informs pass interference calls, there are undoubtedly calls that are simply wrong, such as where there was no contact between the defender and the receiver. Therefore, the application of replay review to pass interference would result in *some* accuracy gains across the run of calls.

89. There is nothing inevitable about the particulars of the replay review system as currently structured. Many of its features could be modified—the types of calls subject to review, the mechanisms for challenging calls, the standard of review, and the like—without (necessarily) affecting its essential character as a system for correcting error.

90. The NFL instant replay process bears some similarities to civil law jurisdictions. The driving force behind civil law systems is a desire to limit the role of the judiciary. Charles H. Koch,

Of course, we do not live in such a world. Few legal rules share the concrete clarity of the sideline or the plane of the goal line. Instead, the appellate process often requires judges to engage in law declaration. Common law courts must determine whether the rules and principles embodied in past cases should be extended to present situations.[91] Courts engaged in statutory interpretation must grapple with ambiguous, inconsistent, and even absent language.[92] It is entirely routine and perfectly acceptable for two competent judges to reach opposite conclusions on a legal issue. Indeed, Congress is often not clear in drafting statutes and punts the job of interpretation to the courts. All of this is complicated further by the expectation that a court will issue a written opinion justifying its decision, and the fact that a court's decision in the case before it will serve as binding precedent in later cases. As a result, the court must engage in its analysis with an eye to the future.[93] Because of this, it is plausible to imagine a court reaching a result in the case before it that it believes to be wrong in the sense of being unjust given the facts of the specific case, but correct in the sense of being consistent with the best rule for the larger class of cases of which it is a part.[94]

There is another sense in which the appellate system's error correction mission is qualified, and it is one that is shared with replay review. Both the appellate review process and instant replay incorporate mechanisms for ensuring that only consequential errors are addressed. In the NFL, this mechanism is driven primarily by the incentives created for the teams. A coach could

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Jr., *The Advantages of the Civil Law Judicial Designs as the Model for Emerging Legal Systems*, 11 IND. J. GLOBAL LEGAL STUD. 139, 150 (2004). Civil law thus differs from common law in that civil law countries are governed by a codified set of laws, rather than judicial interpretation of the law. Mary Garvey Alegro, *The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation*, 65 LA. L. REV. 775, 778 (2005). Additionally, civil law countries generally do not adhere to stare decisis. *Id.* at 779. Likewise, stare decisis does not exist in the NFL because referees are not bound by previous rulings. In both systems the decisionmaker is expected to properly apply the code or rules—a previous ruling that is incorrect is viewed as a hindrance and thus irrelevant. *See* Catherine Valcke, *Quebec Civil Law and Canadian Federalism*, 21 YALE J. INT'L L. 67, 85 (1996).

The litigation process in civil law countries is largely driven by judges. Koch, *supra*, at 152. After pleadings, one judge is responsible for building the record, and a judicial officer prepares his own opinion to assist the court in reaching a decision. *Id.* at 153. Furthermore, the judiciary has total control over fact-gathering. *Id.* One substantial difference appears in the standard of review that governs appeals. In the NFL, of course, the highly deferential "indisputable visual evidence" standard applies. NFL Rules, R. 15, § 9. In contrast, because civil law judges rely on written records on appeal, they engage in de novo review. Koch, *supra*, at 156.

91. *See* Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308, 339-40 (2009) [hereinafter Oldfather, *De Novo*].

92. *See generally* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

93. Oldfather, *De Novo*, *supra* note 91, at 339-40.

94. *See id.* at 344-50.

challenge the spot of the ball in the first quarter on a play where the effect of a successful challenge would be to transform second-and-five to second-and-three, but he would be foolish to do so.[95] He might lose the challenge, and regardless of the outcome would restrict his ability to challenge the more significant calls that might occur later in the game.[96] As noted above, the appellate process likewise creates incentives for parties to limit themselves to challenges of consequential rulings.[97] But these incentives do not operate as effectively in the legal context.[98] As a result, appellate review has incorporated the "harmless error doctrine."[99] Prior to the passage of the Judiciary Act of 1919, federal courts adhered to the rule that any error—regardless of how insignificant—required reversal for a new trial.[100] Now, the Federal Rules of Civil Procedure state that "the court must disregard all errors and defects that do not affect any party's substantial rights."[101]

3. Analysis Directed by a Standard of Review.—One of the more salient similarities between the appellate process and replay review is that in each the inquiry is guided by a standard of review. In law, the standard varies from one context to the next. One commentator has likened the scope of judicial review to that of a telescope, with legislatures adjusting the lens to change the level of judicial scrutiny.[102] Different standards of review apply depending on whether the legal issue is a question of law, a question of fact, or a matter of discretion.[103] Generally, questions of law are reviewed de novo, meaning the appellate court has complete discretion and does not need to defer to the lower court.[104] The commonly offered rationale for this standard of review sounds in institutional competence.[105] The assumption is that the appellate court is just as capable as the

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95. This would be so even if the coach had a running back like Leroy Hoard, who reportedly once told his coach, "if you need one yard, I'll get you three. If you need five yards, I'll get you three." Matt Meyers, *A Giant Duo*, CSTV.COM, Nov. 14, 2007, http://www.cstv.com/roadtripcentral/goingbig/2007/11/14/.

96. *See* Hack, *supra* note 37.

97. *See supra* text accompanying note 78.

98. This is so for a variety of reasons, including the underdeterminacy of legal standards, inconsistent lines of decisions from a single court, agency problems between clients and lawyers, and the lack of incentives against appeal faced by some parties (most notably indigent criminal defendants).

99. *See* Glen Weissenberger, *The Proper Interpretation of the Federal Rules of Evidence: Insights from Article VI*, 30 CARDOZO L. REV. 1615, 1633 n.94 (2009) (defining the harmless error doctrine).

100. *See* Oldfather, *Error Correction*, *supra* note 11.

101. FED. R. CIV. P. 61.

102. Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 682 (2002).

103. Baker, *supra* note 30, at 15-16.

104. BLACK'S LAW DICTIONARY 852 (7th ed. 1999).

105. *See* Oldfather, *De Novo*, *supra* note 91, at 327-32.

trial court to decide legal matters.[106] Indeed, because appellate courts are more prestigious and larger bodies, they are, theoretically, more capable of answering questions of law.

On the other hand, appellate courts grant a tremendous amount of deference to lower court determinations of issues of fact. Here too, the arrangement's justification stems from an understanding regarding relative institutional competence—namely that the trial court is in a better position to handle factual matters than an appellate body.[107] A trial court judge hears all of the testimony, sees all of the witnesses, and deals mostly with factual questions.[108] And although the terminology can vary (clear error, clearly erroneous, substantial evidence, or arbitrary and capricious),[109] appellate courts will only reverse factual questions under extreme circumstances.

In contrast, the NFL has one overriding standard of review for challenged calls: The official must see "*indisputable visual evidence*" to overturn the original call.[110] This standard is highly deferential to the on-field official who made the original call. According the NFL spokesman Greg Aiello, "[u]nder the standard of the instant-replay rule, [the video evidence] has to be clear-cut," otherwise "you can't reverse the call."[111] The rationale for this standard is to prevent instant replay reversals from becoming more controversial than the original call.[112]

Observers in both contexts have suggested that the reviewers do not consistently conduct their review in line with the dictates of the applicable standard. To take just one example from the legal context, some have suggested that appellate courts, as a general matter, fail to show appropriate deference to

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106. Baker, *supra* note 30, at 15.

107. *See* Oldfather, *Appellate Courts*, *supra* note 12, at 444-66.

108. *See id.* at 444-49.

109. One school of thought is that these distinctions are merely semantics. *See* Morales v. Yeutter, 952 F.2d 954, 957 (7th Cir. 1991). As Judge Posner has put it elsewhere, "The only distinction the judicial intellect actually makes is between deferential and nondeferential review. . . . So what is involved in appellate review is, at bottom, simply confidence or lack thereof in another person's decision." RICHARD A. POSNER, HOW JUDGES THINK 113 (2008).

110. NFL Rules, R. 15, § 9.

111. Bart Hubbuch, *Jaguars Notebook*, FLA. TIMES-UNION, Dec. 10, 2002, at D9.

112. There are some who believe that the NFL would do well to adopt a less deferential standard of review on instant replay. *See* Jack Achiezer Guggenheim, *Blowing the Whistle on the NFL's New Instant Replay Rule: Indisputable Visual Evidence and a Recommended "Appellate" Model*, 24 VT. L. REV. 567, 578 (2000). The highly deferential "indisputable visual evidence" standard could be replaced with the "manifest weight of the evidence" standard or even de novo review. *Id.* Officials reviewing a replay—unlike appellate courts—have additional evidence at their disposal in the form of multiple camera angles with close up shots and slow motion. Appellate courts generally defer to the trial court on factual matters because the trial court has a more intimate connection with the evidence. *Id.* at 576. The opposite is true of an official viewing an instant replay.

jury determinations in civil cases.[113] Critics have likewise chastised NFL officials for not following the NFL's clear guidelines.[114] In fact, there is some evidence that NFL officials often apply a de novo standard of review to instant replay. For example, in a December 2008 game between the Pittsburgh Steelers and the Baltimore Ravens, Steelers wide receiver Santonio Holmes caught a pass with his feet inside the end zone.[115] However, the head lineman ruled that the ball did not cross the plane of the goal line.[116] Replays of the catch were inconclusive, with different angles seemingly showing different results.[117] Yet the call was reversed by referee Walt Coleman.[118] As *Sports Illustrated*'s Peter King remarked, "[t]his is the continuing problem with the replay system. I think officials need to realize what 'indisputable' means. It doesn't mean likely, or most likely. We still see calls like this, year after year. . . . I just wish the rule would be applied exactly the way it was intended."[119] In fact, instant replay had this same problem during its first go round.[120]

One might suggest that the league should discard the "indisputable visual evidence" standard.[121] After all, the rationale for de novo review by appellate judges is that they are in as good a position—if not better—to decide questions of law.[122] The same might be said of referees viewing a replay monitor. An on-field official has to make a decision in the blink of an eye with an orchestrated maelstrom of colliding bodies surrounding him. By contrast, a referee reviewing the play on a replay monitor can focus on the precise zone of action from multiple angles with the aid of slow motion and zoomed-in camera shots.

As we discuss below, however, institutional competence is not the only factor.[123] The NFL also has to worry about institutional integrity. If the NFL instituted a lower standard of review for challenged plays, more calls would likely be overturned. This could eventually impact the public perception of the competency of NFL officiating crews. Additionally, a lower threshold for overturning calls would make it more likely that NFL coaches would challenge borderline calls. This would result in longer games with more interruptions, which was the most significant problem with the original replay system.

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113. *See, e.g.*, Eric Schnapper, *Judges Against Juries-Appellate Review of Federal Civil Jury Verdicts*, 1989 WIS. L. REV. 237, 353-55.

114. Posting of J. Red to East Coast Bias, http://www.east-coast-bias.com (Dec. 28, 2007, 11:18 EST).

115. The video can be found at http://www.youtube.com/watch?v=w7z4RXNwHKk.

116. Peter King, *Indisputable Evidence: Steelers Continue to Survive in Tough Games*, SI.COM, Dec. 16, 2008, http://sportsillustrated.cnn.com/2008/writers/peter_king/12/14/Week15/.

117. *Id.*

118. *Id.*

119. *Id.*

120. Eldon L. Ham, *Play it Again Sam—but in a Different Key*, CHI. DAILY L. BULL., Sept. 19, 1997, at 6.

121. And indeed some have. *See supra* note 112.

122. *See* Oldfather, *De Novo*, *supra* note 91, at 327-32.

123. *See infra* Part III.A-B.

B. Points of Contrast

Many of the points of contrast between replay review and the appellate process are too obvious to warrant sustained discussion. No matter the money at stake or the various collateral consequences to players, coaches, and fans, football, as played in the NFL, remains an athletic contest performed within a closed universe pursuant to a fixed set of rules. Rather than attempting to enumerate a comprehensive list of the differences that result from this distinction, this subsection focuses on contrasts that illuminate the nature of the review process.

1. The Architecture of Review.—There are substantial differences between the appellate process and replay review in terms of the context in which review takes place. An appeal, even an interlocutory appeal taken before the proceedings at the trial court have concluded,[124] involves going to an entirely separate tribunal from the one that made the initial decision.[125] More often than not the appellate court will be in a different geographical location than the trial court. With rare exceptions, the appeal takes place at some chronological remove as well, with the various components of the process typically parceled out over several months. It is, on the whole, a process that is clearly distinct from the larger lawsuit from which it arises. To some extent these features of the appellate process may be artifacts of now non-existent historical conditions stemming from various hurdles involving travel and communication.[126] But they serve other purposes as well. Physical separation from the initial decisionmaker serves to reduce any tendency for the reviewing court to be, in effect, too lenient, by avoiding reversal of a trial judge for the simple reason that doing so would make for an uncomfortable ride in a shared elevator. The multi-member nature of appellate courts and relatively relaxed pace of the appellate process, at least as it was traditionally conducted, allows for the sort of reflection and deliberation that is absent in the chaos of the trial process.[127] Oral argument and the court's written opinion provide the two windows through which the public can view the process.[128] These features result in what is generally thought to be a superior decision-making process and combine to foster the perception of legitimacy in the losing litigant. She gets to take her arguments to a higher authority, and in

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124. BLACK'S LAW DICTIONARY, *supra* note 104, at 94.

125. *Id.*

126. *See* Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 IOWA L. REV. 1159, 1178-85 (2004).

127. That sort of reflection and deliberation may now characterize the appellate process as it relates to a small minority of cases. *See, e.g.*, William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 295-96 (1996).

128. These features are increasingly absent from the process. *See* Chad M. Oldfather, *Remedying Judicial Inactivism: Opinions as Informational Regulation*, 58 FLA. L. REV. 743, 764-74 (2006) [hereinafter Oldfather, *Remedying Judicial Inactivism*].

the process of doing so she is afforded a cooling-off period, after which the news that the appeals court has also found in her opponent's favor may sting somewhat less than the original defeat.

All of this is arguably necessary given the nature of the inquiry. As Judge Posner has noted, it is remarkably difficult for an outsider to discern whether a court has done what it is supposed to do, and whether a given decision is the right decision, or even a good decision.[129] Process thus serves as an important proxy for decisional quality.

Replay review, in contrast, takes place immediately and occurs in what is effectively the same location. The reviewing official is a member of the officiating crew that made the call under review, and may even review a call that he himself made.[130] These features work in the context of replay review not only because some of them are necessary to any replay review system in a sporting contest,[131] but also because of the nature of the review process itself. Again, the types of decisions subject to review are limited to those involving what are often quite literally bright-line rulings.[132] Here, in contrast to the judicial context, it is often not merely possible to determine whether a given decision is the correct one, but inevitable following a viewing of the replay. What is more, the teams and the viewing public have the full ability to monitor the reviewing official's decisionmaking. Both the television viewing audience and the fans in the stadium generally have access to the same replays as the reviewing official. As a result, there is little risk that the reviewing official will succumb to any temptation to shade his decision to avoid embarrassing or offending a colleague.

Notably, replay review is not the only, or even the primary, mechanism through which the NFL ensures that officials follow the rules. Instead, the league uses video replay to assess the performance of every official on each play of every game.[133] The league provides the results of these assessments to officials within days after a game, and continually monitors for consistency across its

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> Many of the decisions that constitute the output of a court system cannot be shown to be either "good" or "bad," whether in terms of consequences or other criteria, so it is natural to ask whether there are grounds for confidence in the design of the institution and in the competence and integrity of the judges who operate it.

POSNER, *supra* note 109, at 3.

130. Richard Sandomir, *Referees Turn to Video Aid More Often*, N.Y. TIMES, Jan. 25, 2002, at D1 (noting that referee Walt Coleman reviewed and reversed his own fumble call in the infamous "Tuck Game" between the Raiders and Patriots).

131. One could easily imagine having the review process conducted by a distinct team of officials who never interact with the on-field officiating crew. But immediacy seems absolutely crucial for the simple reason that without it play would have to be suspended until the challenge was resolved. Such a regime seems unworkable in any sporting context where there are factors—like maintaining fans' interest—pushing in favor of reaching a resolution in a short period of time.

132. NFL Rules, R. 15, § 9.

133. Crawford Telephone Interview, *supra* note 87.

officiating crews.[134] In the law, by contrast, appellate review is the primary source of discipline on judges. Beyond that, the system relies on a cluster of structural and cultural mechanisms to keep judicial decisionmaking in check.[135]

2. Scope of Review.—As noted above, both processes illustrate the concept of scope of review in that the court or official reviewing the initial decision is permitted to cast its or his gaze only so broadly.[136] But the relationships between the limitations placed on the scope of the reviewer's inquiry and the raw materials that provide the basis for review are quite different. In the judicial appeals process the materials available to support review by the appeals court are regarded as a primary source of limitation on the court's power. In the NFL, in contrast, the materials that support review (i.e., the replays) generally place the reviewing official in a superior position relative to the official who made the original call.

The limitations on appellate courts are familiar. Because trial judges and juries are present in the trial courtroom when the evidence comes in, they are best positioned to assess the credibility of witnesses, the weight of a particular piece of evidence in the context of the entire case, and the like.[137] Appellate judges, conversely, confront trial testimony in the form of a transcript.[138] The record is "cold,"[139] and thought to provide less reliable clues to aid in answering the question before the court. This is perhaps compounded by the fact that the appellate court is reviewing the record of a secondary account (the trial) designed to determine what actually took place at some earlier time (the events giving rise to the litigation). Additionally, the necessary historical fact-finding often requires the divination of some actor's mental state, such as whether the person acted with intent, recklessly, or the like. In all, the proceedings at the trial level involve using somewhat unreliable inputs in an effort to determine the truth of what happened at some other place and time. The appellate process introduces another layer. The court must use further unreliable inputs to unpack what happened both at the trial level and at the place and time where the operative facts took place. These stacked layers of imprecise inputs stand as an obstacle to effective appellate performance and make a broad scope of review seem inappropriate.

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134. *Id.*

135. For a thorough, if somewhat dated, consideration of these mechanisms, see KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 19-51 (1960).

136. *See supra* Part II.B.1.

137. *See* Ronald R. Hofer, *Standards of Review—Looking Beyond the Labels*, 74 MARQ. L. REV. 231, 238 (1991); Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 759 (1982) ("The most notable exception to full appellate review is deference to the trial court's determination of the facts. The trial court's direct contact with the witnesses places it in a superior position to perform this task.").

138. Michael Pinard, *Limitations on Judicial Activism in Criminal Trials*, 33 CONN. L. REV. 243, 293 (2000).

139. LESTER BERNHARDT ORFIELD, CRIMINAL APPEALS IN AMERICA 85 (1939) ("The cold printed record inevitably must give an incomplete and sometimes distorted picture of the case.").

The instant replay official stands in a different position from the appellate court in at least two respects. First, the replay official does not review secondary evidence of what took place. The opposing teams do not offer testimony and evidence about whether a receiver's foot was on the line for the officials to consider. Moreover, the focus of the replay official's consideration is not so much the on-field official's decision as it is the actual on-field conduct to which that decision is related. An appellate court would operate similarly if its focus was not on what took place in the trial courtroom, but rather on what took place at the time and in the place giving rise to the lawsuit. This difference undoubtedly stems from the second. The replay official not only has a "record" to review that is as good as what the on-field official had, he has a record that is often undeniably better. He has access to multiple angles, and the ability to watch it all in slow motion and high definition.[140] There are limitations—images captured by the stadium Jumbotron fall outside of the purview of instant replay[141]—and inequities—primetime NFL games have additional camera angles,[142] such that officials working less prestigious contests are put at a disadvantage. And the video evidence will not always be conclusive. But within the limited universe of calls that can be challenged, the replay official often has access to better information.

3. The Existence of a Lawmaking Function.—One of the primary functional differences between the review mechanisms in the NFL and in the law concerns the prospective effect of any given ruling. Because appellate courts must consider issues of law, and because existing legal materials are often ambiguous or incomplete, it often falls to courts to, in effect, create law. Despite popular rhetoric to the contrary, this is a non-controversial position.[143] Indeed, even the task of applying a clear legal rule to an established set of facts involves, in a very narrow sense, the creation of law.[144] This is a function of the idea that like cases should be treated alike and the notion of precedent that follows from it. Because like cases are to be treated alike, when a court in Case 1 has determined that

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140. Associated Press, *NFL Will Give Referees Same HD Look as Fans at Home*, ESPN.COM, Aug. 10, 2007, http://sports.espn.go.com/nfl/news/story?id=2968462.

141. Green, *supra* note 33.

142. Troy Aikman, *It's Time to Scrap Instant Replay Because the System Isn't Working*, SPORTING NEWS, Dec. 27, 2004, at 45; Richard Sandomir, *Let's Go to the Tape: N.F.L. Unveils a System*, N.Y. TIMES, May 27, 1999, at D4.

143. Consider, for example, Justice Scalia's opinion for the Court in *Republican Party of Minnesota v. White*, 536 U.S. 765, 784 (2002) ("This complete separation of the judiciary from the enterprise of 'representative government' might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature. It is not a true picture of the American system."). *See also id.* at 784 n.12 ("In fact, however, the judges of inferior courts *often* 'make law,' since the precedent of the highest court does not cover every situation, and not every case is reviewed.").

144. For the view that any application of law to fact should be accorded precedential value, see Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 221-23 (1999).

Result A is required when factors X, Y, and Z are present, a court in Case 2 begins from the presumption that Result A will likewise be required in that case if the same factors are present.[145] The court adjudicating Case 1 must consider the appropriateness of factors X, Y, and Z as triggers.[146] In turn, the court must imagine what subsequent cases will look like and consider whether committing to resolve those cases based on the existence or non-existence of the identified factors will lead to the appropriate set of results.[147]

NFL referees never face such encumbrances. To be sure, some of the rules of the game vest discretion in on-field officials (such as in determining whether a defender's conduct on a given play constituted pass interference) just as trial judges enjoy broad categories of discretion. But these rulings are immune from review, and there is rarely any doubt as to what the NFL rulemakers and the Competition Committee meant with respect to the rules governing those calls that are subject to review. Either the ball crossed the goal line or it did not. Any given call involves some novelty in the extreme sense that the rule has never before been applied in precisely the same situation. But accounting for such novelty adds nothing to the content of the rule—that precise situation will never arise again, and the scope and application of the rule are clear enough that accounting for a prior call via a system of precedent would add nothing to the content of the rule. There simply is no need for a system of precedent in a context like that presented by the NFL.

This is not to suggest that there is no need for something analogous to a lawmaking process in the NFL. There is, and such a process exists. NFL officials have no say as to the meaning of rules, and will be reprimanded for incorrect interpretations.[148] Similarly, the NFL Competition Committee will often release a "point of emphasis."[149] These edicts explicitly state which calls the NFL wants stressed for the upcoming season.[150] For instance, the Committee has told referees to emphasize illegal contact, and sure enough the number of pass interference calls has increased.[151] In essence, the NFL can achieve a desired policy result without changing the rulebook.

The difference between the two systems in terms of the lawmaking function has consequences. It is judges' role as lawmakers—or, perhaps more accurately,

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145. *Id.*

146. *Id.*

147. *See* Oldfather, *De Novo*, *supra* note 91.

148. *See, e.g.*, Seattle Times News Service, *Referee Ed Hochuli Gets Downgraded After Blown Call*, SEATTLE TIMES, Sept. 16, 2008, http://seattletimes.nwsource.com/html/seahawks/2008182066_ref16.html.

149. Len Pasquarelli, *Expect More Illegal Contact Penalties in 2004*, ESPN.COM, Mar. 27, 2004, http://sports.espn.go.com/nfl/columns/story?columnist=pasquarelli_len&id=1771047.

150. *Id.*

151. Kerry J. Byrne, *Golden Age of Passing*, COLDHARDFOOTBALLFACTS.COM, Dec. 3, 2008, http://www.coldhardfootballfacts.com/Articles/11_2564_Golden_age_of_passing.html; Aaron Schatz, *Decline in Offense is Leaving 2004 in N.F.L. Record Books*, N.Y. TIMES, Nov. 6, 2005, § 8, at 11.

the extent to which they should embrace or even acknowledge that role—that accounts for the politicization of judicial selection. Referees, in contrast, do not make the rules, and there are no competing schools of thought on how to interpret the NFL rulebook. It is, relatedly, much easier for the league (and observers) to conclude that an official got a call wrong, and it will often acknowledge as much. Not so in law. In part because of the nature of the rules involved, which require interpretation, it is difficult to reach a definitive conclusion that a court arrived at the wrong result. Imagine the U.S. Congress writing an apology to a litigant because the Supreme Court misinterpreted a statute.

III. BROAD THEMES

In addition to the specific comparisons undertaken in the preceding section, there are several broader themes pertaining to processes of appellate review (or, more generically, review of decisions by a secondary decisionmaker) that are usefully illustrated by consideration of the NFL replay review system and appellate review.

A. The Role of Institutional Competence

A key theme running through discussions of the appellate process is the significance of institutional competence. It is the appellate courts' perceived inability—relative to trial judges and juries—to assess witness credibility, evidentiary weight more generally, and the myriad factors that go into the exercise of trial court discretion that provide the primary justification for deferential review of trial-level fact finding.[152] At the same time, appellate courts' perceived competence advantage with respect to legal rulings forms a substantial part of the justification for their power to engage in plenary review of such questions.[153]

And so it is in the NFL. Replay review depends almost entirely on the belief that an official who has the benefit of looking at a replay will be in a better position to rule on the question under consideration than was the official who made the call in real time. Indeed, the "indisputable visual evidence" standard seeks to ensure that assumption holds true in the case of any reversal of a call: If there is not indisputable visual evidence, then the reviewing official does not enjoy a competency advantage (or at least not one of a sufficient magnitude). The appropriateness of this underlying assumption is easy to appreciate, as fans in stadiums and viewing games on TV do in large numbers each week of the season.

To this point the comparison concerning institutional competence, although apt, may seem somewhat pedestrian and not all that instructive. But there is perhaps something more to be learned from the analogy. Consider that the potential for replay review, and thus for the sort of competence advantage enjoyed by the replay official, has not existed during the entire history of the

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152. *See* Oldfather, *Appellate Courts*, *supra* note 12, at 444-66.

153. *See* Oldfather, *De Novo*, *supra* note 91, at 327-32.

NFL. The possibility of near-instant replay review did not even exist until the introduction of videotape in the 1950s, and the possibility did not evolve into practicality until some time after that.[154] The specifics of the relevant time line are not so important as the fact that the existence of the league predated the possibility of replay review. But just as other aspects of the game and its rules have evolved to accommodate technological, strategic, and other advances, so did replay review arise in the wake of the competence advantage that video technology conferred.

Of course, video technology did not exist at the time our existing appellate structure and processes came into being. The point is not to suggest that appellate review ought to incorporate a use of video technology that is as transformative as replay review has been in the NFL. As we note below, the environment in which appellate review takes place and the sorts of determinations that appellate courts are called on to make are more complex than what is involved in replay review. As a result, it is not enough simply to suggest that what is good enough for the NFL (and now even Major League Baseball[155]) ought to be good enough for the legal system. Still, the NFL's embrace of a competence advantage provided by advances in video technology at least invites consideration of whether the technology might confer similar advantages on appellate courts that could be appropriately accounted for in the review process.

> Video is increasingly pervasive in society, as more and more people gain the ability to record the people and events around them. Video also is increasingly pervasive in law, as more and more of the events recorded in public become the basis for civil and criminal litigation and come to be used as evidence in that litigation.[156]

As a result, many courts and commentators have started to grapple with the issues arising out of video's implications for appellate courts' relative institutional competence. For example, some American courts have referenced the "indisputable visual evidence" standard in the context of evaluating videotaped evidence.[157] In *Carmouche v. State*, the Texas Court of Criminal Appeals utilized videotaped police evidence to hold that the defendant did not consent to a police drug search.[158] The court noted "that the videotape from the patrol car's camera does not support the testimony of Ranger Williams."[159] The opinion emphasized that *Carmouche* presented "unique circumstances" that did

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154. Joe Starkey, *Instant Replay Born 40 Years Ago Today*, PITT. TRIB.-REV., Dec. 7, 2003, *available at* 2003 WLNR 13948466 (noting that instant replay was not utilized by television crews until 1963).

155. Jack Curry, *Baseball to Use Replay Review on Homers*, N.Y. TIMES, Aug. 27, 2008, at D3.

156. Wasserman, *supra* note 17, at 660.

157. Carmouche v. State, 10 S.W.3d 323, 332 (Tex. Crim. App. 2000).

158. *Id.* at 331-32.

159. *Id.* at 331.

not merit the normal deference to the trial court's evidentiary findings.[160] Ultimately, the Texas Court of Criminal Appeals overturned the lower court's holding because "the videotape presents indisputable visual evidence."[161] In a later case, the Texas Court of Appeals declined to apply de novo review to videotape evidence, stating that it "must be considered with all the evidence before the trial court."[162]

The most high-profile case involving video evidence is the Supreme Court's 2007 decision in *Scott v. Harris*.[163] The case concerned whether a police officer involved in a high-speed chase acted unreasonably in ramming into the back of a fleeing motorist's car.[164] The Supreme Court reversed the court of appeals, and held that the officer did not violate the plaintiff's Fourth Amendment right against unreasonable seizure.[165] In reversing the appellate court, the Supreme Court relied on video evidence of the car chase.[166] Justice Scalia remarked that, "[t]he videotape quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals."[167]

Although the trial record demonstrated a discrepancy between the statements of the officer and the statements of the respondent, the Court nonetheless overruled the lower courts and granted the officer's motion for summary judgment.[168] The majority refused to grant deference to the trial court's judgment on factual matters because "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."[169] Justice Scalia held that the video footage of the incident provided indisputable visual evidence to dismiss the case.[170] "Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape."[171]

In his dissent, Justice Stevens chided the majority for arrogating to itself the fact-finding job traditionally reserved for juries.[172] Justice Stevens criticized the

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160. *Id.* at 332.

161. *Id.*

162. Peace v. State, No. 07-02-0347-CR, 2003 WL 22092707, at *2 (Tex. Ct. App. Sept. 9, 2003).

163. 550 U.S. 372 (2007).

164. *Id.* at 374.

165. *Id.* at 386.

166. *Id.* at 378-80. The video can be found at http://www.supremecourtus.gov/opinions/video/scott_v_harris.rmvb.

167. *Scott*, 550 U.S. at 378.

168. *Id.* at 386.

169. *Id.* at 380.

170. *Id.* at 380-81.

171. *Id.*

172. *Id.* at 389-90 (Stevens, J., dissenting).

majority for applying a de novo standard of review to an evidentiary question, and for assuming that residents of Washington, D.C., could better determine the safety of driving on Georgia highways.[173] Given that the district court judge, three appellate court judges, and a Supreme Court Justice thought that the video did not provide a basis for summary judgment, Justice Stevens did not see a reason to remove the factual determination from jurors.[174]

The *Scott* case underscores the tensions that would result from a too-facile acceptance of the similarities between replay review and the appellate process. In *Scott*, the majority dismissed a lawsuit based on factual grounds—a task normally reserved for juries. Because the majority believed that "no reasonable jury" could have found otherwise, the Court prevented a jury from assessing the video.[175] Justice Breyer, in a concurring opinion, likewise emphasized the significance of the video footage in shaping his reaction to the case.[176]

In effect, and without expressly making the analogy, the Justices in the majority regarded themselves as occupying a position that is the functional equivalent of the replay-review official. Whether this was appropriate is open to debate. To be sure, the Justices were in the same position to view the video as a hypothetical jury, and consequently were equally competent to make findings of historical facts. But the analogy may extend no farther. For the Justices to be truly equivalent to the replay official, it would also have to be the case that they are better positioned to characterize what took place in terms of its reasonableness. As Dan Kahan and his colleagues have shown, viewers' assessment of what the video in *Scott* depicts varies along with their cultural and ideological backgrounds.[177]

There are certainly arguments to be made for the normative desirability of the Court's conclusion. "Reasonableness" as applied in this context undoubtedly has a legal component to it, such that the Justices might best be characterized as having supplanted the jury not so much with respect to the finding of fact as to the legal consequences of those facts. Or it may be that the Court's conclusion serves systemic ends such as the avoidance of inconsistent verdicts.[178]

The point is not so much to criticize or defend the specifics of *Scott* as to note that any such conclusions are contestable in a democracy (as opposed to the effectively autocratic world of the NFL), and with respect to inherently judgment-infused standards such as reasonableness (as contrasted with the literally bright lines of a football field). As Wasserman concludes, "[l]ike much else in the law, video is neither an unadorned good nor an unadorned bad; the reality is far more complex."[179] One can appreciate the allure to an appellate

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173. *Id.* at 389.

174. *Id.* at 395-96.

175. *Id.* at 380 (majority opinion).

176. *Id.* at 387 (Breyer, J., concurring).

177. *See* Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 868-69 (2009).

178. *Id.* at 888.

179. Wasserman, *supra* note 17, at 661.

judge of viewing herself as performing a role analogous to that of the replay official. However, the analogy does not hold without significant qualification.

B. The Importance of Context

Effective review of prior decisions, even in a regime focused primarily or exclusively on error correction, is not entirely driven by institutional competence. To be sure, competence plays the largest role. If the second-order decisionmaker lacks the raw ability to make better decisions than the initial decisionmaker, no process of review is likely to be worthwhile. But effective review is a product of more than a simple competence advantage. The reviewing authority must likewise be subject to constraints designed to keep its exercise of authority within appropriate bounds. That is, there must be reason to believe that the second decisionmaker will implement its competence advantages in a responsible way.

Even when those conditions are satisfied, review will not be unconstrained. Accuracy is only one of the many ends the system must serve, many of which conflict with an unfettered quest for correctness. Appellate courts are fond of invoking the idea that litigants are not entitled to a perfect trial, but rather a fair one.[180] A similar dynamic holds on appeal. Finality, for example, is an end in its own right, and one that will often displace the quest for accuracy.[181] The legal system must accommodate a host of conflicting ends.

The contextual constraints on review in the judicial system and the NFL are quite distinct. As noted above, it is difficult to determine whether any given judicial decision is the "correct" decision, and often whether it is even a good decision. We instead rely to a great degree on proxies.[182] Oral argument provides some assurance that decisionmaking is appropriately responsive to the parties' contentions, and the requirement that courts provide a written opinion disciplines decisionmaking by acting as a form of informational regulation.[183] We require judges to recuse themselves in situations where there appears to be too great a possibility that they will be able to act without bias.[184] At a more general level, mechanisms of judicial selection operate to ensure that judges do not fall at the extremes in terms of their approach to the various sorts of issues they are likely to confront. At the same time, review in the judicial system is structured so as to place the reviewing court, at least in most instances, at some remove from the lower court. As noted above,[185] the appeals court is a separate

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180. This idea in the Supreme Court at least, appears to have originated in *Lutwak v. United States*, 344 U.S. 604, 619 (1953).

181. *Cf.* Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1194-95 (1979) (suggesting that the attainment of "authoritative finality," rather than accurate determinations of guilt, may be the primary goal of the criminal justice system).

182. *See* POSNER, *supra* note 109, at 3.

183. *See* Oldfather, *Remedying Judicial Inactivism*, *supra* note 128, at 764-67.

184. *See* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2257 (2009).

185. *See supra* Part II.B.1.

tribunal that is, as a general matter, distant in time and location from the initial decisionmaker. This serves to reduce the likelihood that the reviewing court will identify too strongly with the trial judge, or otherwise feel constrained (interpersonally or otherwise) from reversing the full range of decisions that should be reversed.[186] It also has some effects in terms of furthering the perception of systemic legitimacy more generally. Affording litigants the opportunity to appeal, while doing so in the context of a system that incorporates a "cooling off" period, likely results in greater litigant satisfaction than would be the case under alternative mechanisms.[187]

There is almost no reliance on proxies in the NFL. For the category of decisions that are subject to review, the identity of the correct decision is not subject to dispute. It would be difficult to imagine a more open process of review. Although the replay official goes under a hood to conduct his review, the teams and the spectators (both those at the game and those watching on television) have access to the same information and have the ability to assess the information independently. There is, accordingly, no need for other mechanisms to discipline the replay official's conduct of the review process. Note as well that these contextual constraints are powerful enough that there is no concern about the fact that the person conducting the review was part of a team of officials whose call is under review, and may even be in the position where he has to review his own call.[188]

Too much significance may be drawn from these contextual differences. After all, the geographic and chronological distance present in the appellate judicial process is at least as much a product of factors such as the need to allow parties time to prepare an appeal and the relative logistical convenience of having appellate courts convene at a central location as it is a reflection of some conscious effort to create space between decisionmakers at the various levels involved. In similar fashion, the instant replay process is undoubtedly driven by the need to have a review mechanism that can be implemented without interrupting the flow of the game or otherwise detracting from the game's entertainment value.

Consider the NFL's reluctance to part with the chain measurement system. Legendary broadcaster Pat Summerall has objected to its continuing use: "There must be a better way . . . . Because games are decided, careers are decided, on those measurements."[189] Nonetheless, although several laser-based systems have been developed by entrepreneurs to replace the antiquated chains, the NFL continues to use the old system for a variety of reasons.[190] Part of the rationale

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186. *See supra* Part II.B.1.

187. *See generally* Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871 (1997) (considering the effects of procedural mechanisms on litigant satisfaction).

188. *See, e.g.*, Sandomir, *supra* note 142.

189. John Branch, *In High-Tech Game, Football Sticks to an Old Measure of Success*, N.Y. TIMES, Jan. 1, 2009, at A1 [hereinafter Branch, *High-Tech Game*].

190. *Id.*

is tradition; the seven members of the crew are lovingly referred to as the "chain gang."[191] However, the most important reason was summed up by the NFL's vice-president for officiating: "When we measure, we make sure the players are clear so that TV can get a good shot of the actual measurement."[192] The drama of close measurements helps make football America's favorite spectator sport.[193]

The rationale for maintaining the chain gangs instead of adopting a more accurate computer system is similar to the reason the NFL limits the use of instant replay. If the NFL's sole objective were getting every single call correct, replay's usage would be unlimited. The NFL could order a mandatory thirty second pause after each play, and replay officials could meticulously scan multiple angles of the previous play in search of a missed call. However, this would slow the game to a crawl, and eliminate the drama that makes the NFL so unique.

Some commentators have even called for abolishing replay on the grounds that human error is an indispensable part of the game.[194] In fact, the 2008 season provided several examples where replay did not result in a reversal of an incorrect call.[195] Furthermore, replay has inherent limitations that occasionally result in blatantly incorrect calls standing. Last October, the Philadelphia Eagles were leading the Atlanta Falcons 20-14 with two-and-a-half minutes remaining.[196] The Falcons were out of timeouts, but the Eagles were punting. After a short punt, the Falcon's return man Adam Jennings ran at, but did not touch, the football.[197] However, the referee ruled that Jennings did touch the ball, and the Eagles recovered.[198] The call was undoubtedly incorrect, but because the clock was still outside of two minutes and the Falcons were out of timeouts, replay was powerless to right the wrong.[199]

Because the goal is not a perfectly officiated game, the NFL is willing to live

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191. John Branch, *The Orchestration of the Chain Gang*, N.Y. TIMES, Jan. 1, 2009, at 2009 WLNR 19349.

192. Branch, *High-Tech Game*, *supra* note 189.

193. *See* Bryan Curtis, *The National Pastime(s)*, N.Y. TIMES, Feb. 1, 2009, § WK, at 5 (noting that, according to a Harris Interactive Survey, forty-two percent of Americans say football is their favorite sport).

194. Posting of Howard Wasserman to Sports Law Blog, http://sports-law.blogspot.com/ (Sept. 10, 2007 10:00).

195. Peter King, *Eleven Opinions in NFL's Week 11*, SI.COM, Nov. 17, 2008, http://sportsillustrated.cnn.com/2008/writers/peter_king/11/16/week11/index.html; Peter King, *Where Do You Begin on One of the Most Dramatic NFL Sundays Ever?*, SI.COM, Sept. 15, 2008, http://sportsillustrated.cnn.com/2008/writers/peter_king/09/15/Week2/index.html (go to page three of the article).

196. Peter King, *Expect Replay Rule to be Tweaked in Wake of Eagles-Falcons Blown Call*, SI.COM, Oct. 29, 2008, http://sportsillustrated.cnn.com/2008/writers/peter_king/10/28/mail/index.html.

197. *Id.*

198. *Id.*

199. *Id.*

with a limited and flawed instant replay system. Similarly, the appellate review process does not always result in the proper decision—the Supreme Court can reverse a circuit court, or circuit splits can emerge. However, the major difference is that in the NFL it is much more plausible, if not entirely accurate, to suggest that the "right call" exists on every play.[200] In the appellate process, the "right decision" often does not exist because different judges come to different—and logical—conclusions. The two systems are similar in that neither produces perfect results. The difference is that the NFL accepts imperfection to maintain the pace of the game, while perfection is not attainable in the legal appeals process.

A final contextual point worth noting is that the existence of a review mechanism can affect the performance of the initial decisionmaker. Ideally, the effect is positive, in that the prospect of having a decision reversed following the exercise of review leads trial judges and referees to take greater care to ensure that the initial decision is correct. But at the same time, there is a risk that the prospect of review will engender hesitancy or an unwillingness to make decisions. Put differently, if the initial decisionmaker senses that his decision will inevitably be second-guessed he may not think it necessary to focus on reaching the best decision, or will err on the side of making the decision that is most readily undone should the second-level decisionmaker come out the other way.[201] Any review mechanism introduces this concern, and those responsible for institutional design must take care to guard against it lest it lead to a decline in the overall accuracy of the system.

C. The Difficulty of Achieving Perfect Constraint Through Rules

Both the legal system and the NFL rely on rules, though the two systems employ rules in dissimilar ways. In law, rules are typically a means to a readily identifiable end, and their relationship to that end is often apparent. In similar fashion, qualifications to those ends—and thus to the rules—tend to be equally apparent. Rules of procedure seek to balance the accurate resolution of disputes against concerns of efficiency and fairness. Substantive law aims to, for example, balance the need to take safety precautions against the cost and practicality of doing so. The result is that legal rules are inevitably both over- and under-inclusive.[202] This creates a tension because the application of a rule

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200. Some dispute this notion, because different referees will come to different conclusions, particularly on judgment calls. However, the NFL director of officiating grades each official to determine the number of mistakes made per play. *See* Judy Battista, *In N.F.L., Wrong Calls and Wrong Assumption*, N.Y. TIMES, Nov. 2, 2008, at SP3. Thus, the League believes that each whistle is either correct or incorrect.

201. There is a further danger that might arise if this effect is too pervasive. If the initial decisionmaker believes that all important decisions will be subject to review, the perceived quality of the initial decisionmaker's job—whether it be judge, referee, or some analogous position—will decrease, thereby making it more difficult to attract high-quality people to the position.

202. *E.g.*, FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION

to a given factual situation appears to conflict with the ends the rules are designed to further. Indeed, it is no revelation that the legal system's rules place imperfect constraints on judges.[203] A certain amount of indeterminacy inheres in any system that attempts to govern something as complex and varied as human affairs. The dynamic is compounded by the fact that the mechanisms for policing courts' compliance with rules are themselves imperfect. Many commentators have suggested that, in most cases, a determined judge will be able to justify any result she seeks to reach.[204] Whatever the reality, the very notion of the rule of law invokes in most observers the sense, at least as an aspiration, that the decision-making process will often, if not always, involve a mechanical process of applying a clear rule to an established set of facts.

Consideration of the history of replay review demonstrates just how difficult this ideal is to achieve. Rule-governed decisionmaking in the NFL differs from that in the legal system in at least two fundamental respects. First, the rules do not serve other ends so much as they serve as ends in themselves. To be sure, the rules of games are designed to foster competitive balance and, at least in some cases, to make the game enjoyable for spectators. But it does not make sense to speak of the rules of football as being over- or under-inclusive in the way that legal rules are. The rules are assumed to be fixed, and no one is entitled to argue that, for example, a team should be awarded a first down when its running back fell just inches short but did so via a spectacularly entertaining run. Second, the calls subject to review almost uniformly involve bright-line determinations, and the "indisputable visual evidence" standard requires a high level of proof in order for a call to be reversed. The question for the reviewing official seems to be as susceptible to mechanical application as any such question can be—for example, "after viewing this replay can I conclude, to a level of certainty such that no person could question it, that the ball broke the plane of the end zone?" In all, the differences suggest that the process of refereeing an NFL game should be considerably more amenable to governance by rule than that of judging, and it seems beyond dispute that it is so. But there is another lesson here. Even in the NFL, rules do not provide a perfect constraint. Despite the seeming-clarity of the replay-review inquiry, and the fact that it is undertaken in a way that is completely open to public scrutiny, the process still leads to occasional results that nearly everyone agrees are wrong. Human institutions, it seems, are prone to mistakes.

OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 31-34 (1991).

203. *See* Oldfather, *De Novo*, *supra* note 91, at 320-24.

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> Subtle rules about presumptions and burden of proof, elaborate concepts of causation and consideration and the rest, have been devised in such a way that unless the appellate judge handling the case is a dullard, some doctrine is always at hand to achieve the ends of justice, as they appear to the appellate court.

Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 751 (1957).

CONCLUSION

Just as the suggestion that the judicial role is analogous to that of a baseball umpire has persisted,[205] the comparison of appellate review to the review of an NFL official's call seems likely to have lasting allure, particularly given the increasing use of video evidence in the legal setting. Perhaps the most salient lesson of this extended comparison of the two processes is that easy analogies can often mislead. On the surface, the analogy works, and this Article highlights the ways in which the process of replay review exemplifies certain components of a process of appellate review. Not only does it involve the use of a standard of review, but it also illustrates the significance of institutional competence to processes of review, the influence of contextual constraints, and the ways that adversarialism can be tempered, among other things. But an extended comparison of the two processes also demonstrates that there is more to the analogy than meets the eye. Institutional design is complex. Features of a review mechanism are products of, and have effects on, the larger system of which they are a part. "Indisputable visual evidence" works as a standard of review in the NFL because the calls in question turn on clear, verifiable determinations, and because the standard is amenable to the sort of quick application necessary in the midst of a game in which it is important to maintain the audience's interest. It might work in some legal contexts for certain types of questions. But any urge to transport the standard—or any aspect of replay review—to the legal context must be tempered by the realization that appellate review takes place in a different context and in a system that must balance a different set of ends.

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205. *See* Roberts Statement, *supra* note 3.

HOLLOW PROMISES FOR PREGNANT STUDENTS: HOW THE REGULATIONS GOVERNING TITLE IX FAIL TO PREVENT PREGNANCY DISCRIMINATION IN SCHOOL

KENDRA FERSHEE*

INTRODUCTION

Teen pregnancy has been long decried as a plague on America, and fighting teen pregnancy has received vast resources and intense attention since it began to be publicly acknowledged as a problem in the late 1960s.[1] Unfortunately, too often those who fight teen pregnancy fail to notice the difference between eradicating teen pregnancy and eradicating pregnant teens. Not long ago the driving policy implemented to rid society of teen pregnancy was to abolish the pregnant teen from school, where, the theory went, she would be seen and copied by other teens. In the 1970s, the unfairness of the practice of purging schools of pregnant teens appeared to have been recognized by Congress when it passed Title IX and authorized its implementing regulations ("Regulations").[2] Unfortunately, the Regulations were and continue to be, weak and do little to stop schools that discriminate against pregnant teens.

In 1973, Congress passed Title IX with the intent to equalize educational opportunities for young women.[3] A few years later, the Department of Health, Education, and Welfare (HEW)[4] enacted Regulations to clarify the rights and responsibilities of the schools and students, including pregnant students, governed by Title IX.[5] The Regulations have weak provisions intended to protect pregnant students from discrimination in school. HEW must strengthen the Regulations to require that school administrators learn about how to treat pregnant students lawfully, to provide regulators the best opportunity to root out pregnancy discrimination when it happens, and to punish schools that violate the law.

Until the early 1970s, it was common for pregnant students to suffer terrible

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1. Helen Rauch-Elnekave, *Teenage Motherhood: Its Relationship to Undetected Learning Problems*, ADOLESCENCE, Spring 1994, at 91, 91 (stating that the problem of teenage parenthood, a significant social problem in the United States since the late 1960s, has been the subject of much study).

2. *See* 20 U.S.C. § 1681(a) (2006); 34 C.F.R. § 106.40 (2009).

3. 20 U.S.C. § 1681(a).

4. HEW was split and renamed the Department of Health and Human Services and the Department of Education in 1980. *See* Department of Education Organization Act, Pub. L. No. 96-88, § 509(e), 93 Stat. 695 (1973) (codified at 20 U.S.C. §§ 3508, 3411 (2006)).

5. *See* U.S. COMM'N ON CIVIL RIGHTS, ENFORCING TITLE IX 2-10 (1980), http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/39/84/56.pdf [hereinafter 1980 COMMISSION R.].

treatment at the hands of their educators.[6] Pregnant students were expelled from school, sent to homes in distant towns or states when their pregnancies became visible, hidden from the public, and essentially scorned from society.[7] In 1980, after being forced by litigation to confront rampant school noncompliance with Title IX, HEW implemented the Regulations to, among other things, give force and effect to the protections in Title IX afforded to pregnant students.[8] HEW meant the Regulations to do several things, including protect pregnant students from school pressure to drop out or temporarily leave during their pregnancy.[9] The Regulations require federally funded schools to provide education to pregnant girls and to give them a choice regarding the location of their schooling.[10] Young women who are pregnant can continue at the school they attended when they became pregnant or at an alternative school for pregnant or parenting teenagers.[11]

Although well intended, the protections in the Regulations are not adequate to educate, identify, and punish school administrators who treat pregnant students unlawfully. This lack of accountability can result in flagrant violations of the Regulations and Title IX that negatively impact educational opportunities for pregnant students. In theory the Regulations do three things. First, they guarantee a pregnant student's right to public education. Second, they promise that the education she receives will be equal to the education she would receive if she were not pregnant. Third, they give her the option of staying in her mainstream school or going to an alternative school during her pregnancy that provides an equivalent education to her mainstream school. In reality, the weak and incomplete Regulations leave pregnant students at the mercy of their educators who may, through animus or ignorance, treat pregnant students unlawfully with few or no legal repercussions.

The Regulations have inadequate mechanisms to ensure that schools and administrators know of or heed their dictates, and courts do little, if anything, to enforce them. As a result, the three goals of the Regulations—access, choice, and parity—are not met. First, the weaknesses allow school administrators the opportunity to pressure a pregnant girl, who is likely in a heightened state of vulnerability and impressionability, into dropping out of school or attending an alternative school, despite her federally protected right to make those choices herself. Second, the weaknesses permit a school district to operate inferior schools for pregnant girls. Third, the weaknesses permit a combination of the preceding problems to result in a high dropout rate among pregnant teens,[12]

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6. *See* ANN FESSLER, THE GIRLS WHO WENT AWAY: THE HIDDEN HISTORY OF WOMEN WHO SURRENDERED CHILDREN FOR ADOPTION IN THE DECADES BEFORE *ROE V. WADE* 72 (2006).

7. *Id.* at 71-72.

8. 34 C.F.R. § 106.40 (2009).

9. *Id.* § 106.40(b)(1).

10. *Id.* § 106.40(b)(3).

11. *Id.*

12. NAT'L WOMEN'S LAW CTR., HOW TO KEEP PREGNANT AND PARENTING STUDENTS FROM DROPPING OUT: A PRIMER FOR SCHOOLS 1 (2007), http://www.nwlc.org/pdf/FinalPregnancy

effectively nullifying Title IX's ultimate goal of keeping pregnant girls in school.

Part I of this Article examines the history of education for girls in the United States, particularly with respect to how pregnant students were treated, and the goal of the Title IX Regulations to minimize the damage a school-aged girl can suffer when she finds herself pregnant. Part II of the Article examines the problems with and proposed solutions for the Title IX Regulations regarding pregnant students. The Article concludes with a list of the specific revisions suggested throughout the Article.

I. THE HISTORY OF EDUCATION FOR PREGNANT GIRLS IN PUBLIC SCHOOLS AND THE GOALS OF THE TITLE IX REGULATIONS TO RECTIFY THE HARMS

Public education in the United States did not exist until many years after the birth of the nation.[13] Early, the largely agrarian society in the United States did not lend itself to the idea of children spending time away from the farm learning about impractical things.[14] Over time, as the nation's financial foundation became industrial, education gained importance for more than just those families who could afford (both in a monetary and temporal sense) to send a child to school.[15] Still, educating girls was less of a priority than educating boys because girls were expected to marry, have children, and stay at home.[16]

Eventually the value of education for girls began to rise.[17] More young women attended school, and coeducation became the standard in public education.[18] At the same time, society began to experience a sexual revolution of sorts; young men and women were experimenting with premarital sex at dramatically higher rates than they did before World War II.[19] The combination of these two factors—more girls in public schools and more sex among young people—resulted in more pregnancies among girls attending

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FactSheet.pdf (noting that "one-quarter to one-third of female dropouts say that pregnancy . . . played a role in their decision to leave school").

13. *See* Ian Bartrum, *The Political Origins of Secular Public Education: The New York School Controversy, 1840-1842*, 3 N.Y.U. J. L. & LIBERTY 267, 280-85 (2008) (discussing the beginning of the "common school" concept in the mid-1800s, which developed to provide education to all children, regardless of their ability to pay for school).

14. *See* Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 TENN. L. REV. 359, 373 (1997) (explaining how the culture of America shifted between 1800 and 1900 from agrarian to industrial and resulted in more people attending school).

15. *See id.*

16. *See* Susan McGee Bailey & Patricia B. Campbell, *Gender Equity: The Unexamined Basic of School Reform*, 4 STAN. L. & POL'Y REV. 73, 75-76 (1993) (describing the policy of educating girls in early "common schools" before or after the school day, but only if their parents financed it).

17. *See id.* at 75.

18. *See id.*

19. *See* FESSLER, *supra* note 6, at 29-31.

school.[20]

Public schools, as many sectors of society from the 1940s to the 1970s, did not treat girls with the same regard boys enjoyed.[21] Pregnant girls were no exception to the general rule; they were singled out for particularly egregious treatment by society, public schools, and their parents.[22] The stigma pregnancy cast on an unmarried girl could reach far beyond her as an individual; it could also stain the reputation of the school she attended and her family name.[23] Image was such a part of survival in American society in the 1940s and 1950s that it is easy to imagine that a principal would go to great lengths to avoid being perceived as running a school where young girls got themselves into trouble.[24] Schools also feared that pregnancy was contagious and would result in even more pregnancies among girls who would want to get pregnant if the school exposed them to a pregnant peer.[25]

As a result of these fears as well as alleged concerns for a pregnant girl's health in a school environment, schools commonly dealt with the issue of teen

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20. The lack of access to birth control is another large factor that contributed to the rise in pregnancy rates for girls attending school, but the legal issues stemming from that debate have already filled many law review articles.

21. *See* Bailey & Campbell, *supra* note 16, at 76.

22. *See* FESSLER, *supra* note 6, at 67-74.

23. *See id.* at 72.

24. *See id.*

25. *See* Perry v. Grenada Mun. Separate Sch. Dist., 300 F. Supp. 748, 752 (N.D. Miss. 1969). In this pre-Title IX case, the court ruled that permanent expulsion, without a hearing, of students who were expelled when their pregnancy was discovered violated their Due Process and Equal Protection rights. *Id.* at 753. Although the court ruled that schools must hold a hearing to determine whether a student should be readmitted after her pregnancy, it did not consider that barring students during their pregnancies could also be a violation of their constitutional rights. Admittedly, the plaintiffs were "unwed mothers" who did not bring the action until after their pregnancies, and it appears that they did not argue that their expulsions during their pregnancies were a violation of their rights. *Id.* at 749. But the court's opinion of the effect pregnant students would have on the student body was clear:

> [T]he Court is aware of the defendants' fear that the presence of unwed mothers in the schools will be a bad influence on the other students vis-a-vis their presence indicating society's approval or acquiescence in the illegitimate births or vis-a-vis the association of the unwed mother with the other students.
>
> The Court can understand and appreciate the effect which the presence of an unwed pregnant girl may have on other students in a school. Yet after the girl has the baby and has the opportunity to realize her wrong and rehabilitate herself, it seems patently unreasonable that she should not have the opportunity to go before some administrative body of the school and seek readmission on the basis of her changed moral and physical condition.

Id. at 752.

pregnancy by literally expelling the problem.[26] Although the expulsion was not always permanent, removing the pregnant student from school during her pregnancy was considered necessary to avoid "contaminating" the students with a pregnancy.[27] Whether any alternative programs would be available to a pregnant teen was dependent on the wishes and financial situation of her parents and had little to do with the wishes of the pregnant teen.[28] The alternatives, for many years, were homes set up for pregnant girls that would simply house them until they gave birth and served no educational purpose.[29] The homes were simply meant to hide pregnant girls from their home communities in an effort, if not to keep the pregnancy secret, at least to provide her family and local community with plausible deniability.[30]

In the early 1970s, Congress began to recognize rampant unequal treatment of girls educated in America and addressed the inequities by guaranteeing all girls a right to equal education.[31] The language of Title IX is straightforward: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[32] The broad wording of Title IX went largely unheeded in the immediate years after its enactment, resulting in continued sex discrimination in schools.[33] Public pressure from several sources grew until the Regulations were enacted to clarify the rights and responsibilities of schools that receive federal funding and their students under Title IX.[34]

Like Rome, the Regulations implementing Title IX were not built in a day. Although the simplicity of the mandate in Title IX makes it broad in its scope and bars all school discrimination based on sex other than enumerated exclusions for certain activities (such as beauty pageants and choir), its imprecision left schools without guidelines about how to treat students lawfully.[35] Unlawful behavior continued virtually unabated in schools governed by Title IX.[36] Congress then passed the Education Amendments of 1974, which specifically directed the HEW to "prepare and publish . . . proposed regulations implementing the provisions of

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26. *See* FESSLER, *supra* note 6, at 72.

27. *See* WANDA S. PILLOW, UNFIT SUBJECTS: EDUCATIONAL POLICY AND THE TEEN MOTHER 64-68 (2004) (describing several cases, including *Perry*, 300 F. Supp. 798, where pregnant teens were expelled from school to keep the student body from being "contaminated" by a pregnancy in their midst).

28. *See* FESSLER, *supra* note 6, at 133-50.

29. *See id.* at 139 (stating that the schedule in maternity homes concentrated on chores and maybe some private tutoring).

30. *See id.* at 131-54.

31. *See* 20 U.S.C. § 1681(a) (2006).

32. *Id.*

33. *See* 1980 COMMISSION R., *supra* note 5.

34. 34 C.F.R. §§ 106.1-106.71 (2009).

35. *See* 1980 COMMISSION R., *supra* note 5.

36. *See id.* at 5.

the education amendments of 1972 . . . relating to the prohibition of sex discrimination in federally assisted education programs."[37] The Regulations went into effect on July 21, 1975.[38]

The Regulations feature three main goals that address the rights of pregnant girls to a public education. First is access. The Regulations forbid schools from expelling pregnant students.[39] Second is choice. The Regulations require that pregnant students be able to choose whether they want to attend an alternative school, if one is available, or stay in the school they attended when they became pregnant.[40] Third is quality. The Regulations require that school districts ensure that the alternative schools open to pregnant teenagers be comparable to mainstream schools.[41] The most important and pressing goal of the Regulations was to guarantee pregnant students access to education.

A. Goal One: Access

Public schools in the post-World War II and pre-Title IX era were not shy about expelling unmarried pregnant girls once their pregnancies became known or apparent.[42] Many schools also had policies of expelling married girls when they became visibly pregnant.[43] Lee Burchinal's 1960 study of Iowa public and parochial schools focused on school policies with regard to married students' attendance of their schools, but he also surveyed how schools dealt with pregnant students.[44] His study showed that 90% of schools surveyed had policies that required or encouraged young women who were married before they became pregnant to leave school during their pregnancies; only 10% of the schools surveyed left the decision whether to stay in school to the young pregnant woman.[45] Girls who married after they became pregnant fared worse—92% were expelled or encouraged to leave before their delivery date.[46]

1. Exclusion as a Rule.—Although the statistics in Iowa are not conclusive evidence that every school in every state had policies requiring expulsion of pregnant girls, the startling pervasiveness of Iowa's practice is a good example

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37. H.R. Res. 69, 93d Cong. (1974) (enacted).

38. 34 C.F.R. § 106.1 (2009).

39. *Id.* § 106.40(b)(1).

40. *Id.* § 106.40(b)(3).

41. *Id.*

42. *See* FESSLER, *supra* note 6.

43. Lee B. Burchinal, *School Policies and School Age Marriages*, FAMILY LIFE COORDINATOR, Mar. 1960, at 43, 44.

44. *Id.* at 43.

45. *Id.* at 44 (noting that 29% of schools required immediate withdrawal of married pregnant students and 21% encouraged them to withdraw; another 20% required withdrawal by a certain date; and an additional 20% had policies requiring withdrawal under certain case-by-case circumstances).

46. *Id.* (noting that only 8% of schools left the decision to the pregnant student).

of general practices throughout the country at the time.[47] The scorched earth policies most schools employed in dealing with pregnant students are not surprising considering the similarly discriminatory policies requiring that pregnant teachers take maternity leave without pay around the time their pregnancies became obvious.[48] As recently as 1986, a school board fired a pregnant woman from her teaching job because she was unmarried.[49]

The philosophy behind expulsion often focused on a few common themes. First, school administrators feared that the mere presence of pregnant girls would influence other girls to become pregnant.[50] Second, the stigma attached to unwed pregnant teenagers was so prevalent in the 1940s, 50s, and 60s that families and schools resorted to nearly inhumane treatment of pregnant girls when they discovered their pregnancies to hide their state of "shame."[51] Third, many school administrators claimed to be concerned that pregnant students would be exposed to health risks by attending school.[52] A fourth concern, centered on the lack of resources schools had to deal with the physical and emotional needs pregnant teens presented, like seating that could not accommodate a pregnant girl's growing belly.[53] Each of these reasons standing alone may have allowed school administrators to justify discriminatory exclusion of particular pregnant girls from school, but the confluence of the many and varied reasons to exclude pregnant girls explains the prevalence of the practice.

a. Contagious pregnancy.—Without any proven basis for the belief, school administrators throughout the county believed, and to a large degree still believe, that a pregnant peer would be an advertisement to all of the young women in her school that they should follow her lead into pregnancy.[54] At least one study has shown that teen pregnancy rates are higher in communities where social norms do not negatively reinforce the concept of parenting during the teen years, but it is not clear that school attendance has anything to do with these norms.[55] In June

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47. *See* KRISTEN LUKER, DUBIOUS CONCEPTIONS: THE POLITICS OF TEENAGE PREGNANCY 62 (1996) (citing a 1968 Children's Bureau survey, which showed that more than two-thirds of public school districts in the country had explicit policies of expelling pregnant students in the late 1960s); DANIEL SCHREIBER & RUBY J. DAY, SCHOOLS FOR PREGNANT GIRLS IN NEW YORK CITY 4 (1971).

48. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 646-47 (1974) (holding that school board policy of requiring pregnant teachers to take maternity leave four to five months before the birth of the baby was a violation of their due process rights); Williams v. San Francisco Unified Sch. Dist., 340 F. Supp. 438, 442-43 (N.D. Cal. 1972) (holding that school policy of requiring certificated employees of the school district take maternity leave at least two months before the delivery of the child violated the Equal Protection Clause).

49. *See* Ponton v. Newport News Sch. Bd., 632 F. Supp. 1056, 1059-60 (E.D. Va. 1986).

50. *See* PILLOW, *supra* note 27, at 64-71.

51. *See* FESSLER, *supra* note 6, at 101-19.

52. PILLOW, *supra* note 27, at 102-04 (noting that these reasons for exclusion remain today).

53. *Id.*

54. *See id.* at 64-71.

55. *See* SUZANNE RYAN ET AL., CHILD TRENDS, HISPANIC TEEN PREGNANCY AND BIRTH RATES: LOOKING BEHIND THE NUMBERS 6 (2005), http://www.childtrends.org/Files/HispanicRB.

2008, a media storm swirled around a story in Gloucester, Massachusetts about a group of teenagers who allegedly entered into a "pregnancy pact," in which they agreed to get pregnant and raise their babies together.[56] The story lost momentum when students and administrators at the school cast doubt on its factual authenticity.[57] The idea that girls will find pregnancy desirable when their peers come to school pregnant and seek to mimic them likely springs from misinformation and unscientific conjecture (like that in the Gloucester story), and certainly should not be a justification for expelling pregnant students.

It is unclear why decisionmakers at schools where teen pregnancy was unusual believed that other students would perceive a pregnant teenager to be in an enviable state and further that her mere presence would encourage others to follow suit.[58] Certainly, administrators did not appear to consider that the inclusion of pregnant teens could serve as an effective deterrent to teen pregnancy. Because there are likely so many influences on the teen pregnancy rate, it is difficult to know what the determinative factors for a higher rate of teen pregnancy are in a particular school district. Even if the theory that pregnant teens encourage more teens to become pregnant holds true, it does not mandate expulsion as the singular solution to the problem of teen pregnancy. Allowing a pregnant or parenting teen to remain in school could teach valuable lessons about the difficulties that accompany parenthood, but schools instead routinely chose to address the problem with extreme vitriol—expulsion was the only option.

Often the removal from school was temporary, and the teen could come back to school after she gave birth.[59] This was during a time when the vast majority of babies born to unmarried teen mothers were given up for adoption; so there was no baby to alert the community as to why the teen left school and she could

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pdf ("[T]he tendency among *all* Hispanic teens to hold less negative views of teen pregnancy than teens in the overall population may be one factor contributing to Hispanic teens' high pregnancy and birth risks; if some sexually active teens do not feel a strong aversion to becoming pregnant, they likely will not be as careful to avoid it.").

56. *See* Kathleen Kingsbury, *Postcard: Gloucester*, TIME, June 30, 2008, at 8. The story was originally published June 18 on Time.com and created quite a stir almost immediately; so the response the story received from Gloucester students and administrators appears to have been published before the cover date of the print article. Kathleen Kingsbury, *Pregnancy Boom at Gloucester High*, TIME.COM, June 18, 2008, http://www.time.com/time/world/article/0,8599,1815845,00.html.

57. Patrick Anderson, *Gloucester Officials Question Pregnancy 'Pact,'* GLOUCESTER DAILY TIMES ONLINE, June 20, 2008, http://gloucestertimes.com/punews/local_story_172215712.html.

58. *See* Wanda Pillow, *Teen Pregnancy and Education: Politics of Knowledge, Research, and Practice*, 20 EDUC. POL'Y 59, 67-70 (2006) (discussing the "contamination discourse" among educators).

59. *See* FESSLER, *supra* note 6, at 134-35. Anecdotally, many people in this generation tell stories of girls in their school going to help an ailing aunt in Rhode Island or some similar excuse that would explain, however lamely, her extended absence. *See id.*

reintegrate into the school community without much disruption.[60] The need felt by administrators to hide the fact that a teen attending a school in the district had become pregnant was closely tied to the fear they had that the school's reputation would suffer by allowing the pregnancy to become public. The reputation of the school as a place where teens were pure and innocent was of paramount importance to school administrators during the pre-Title IX years.[61]

b. Reputation trumps educational quality.—The decades before Title IX were a tumultuous time for Americans. After World War II, the vast majority of Americans shared the sentiment that being alike was the only way to succeed in society.[62] Being part of a larger community traditionally was desirable for most people, as is clear from the effectiveness of excommunication as a punishment in most major religions throughout the ages where the faithful were forbidden from engaging in any social, legal, or business contact with outcasts.[63] Growing numbers of immigrants and socioeconomic changes among those people who had been in the United States for more than a generation led to a strong desire for assimilation.[64] The problem was that true assimilation, the dictates of which varied depending on the region, was impossible for some and difficult for many to attain. This fact, however, did not change the reality that many people perceived nonconformance to be socially fatal.[65]

Although being different would not necessarily result in starvation or homelessness in mid-twentieth century America, it could result in severe social isolation.[66] Institutions as well as individuals certainly felt the pressures to be like others.[67] The better the reputation a school held, the more likely the administrators and teachers could feel assured that their jobs were safe and their communities would grow. Having a good reputation included not only academically preparing students for the world beyond high school, but also maintaining a student body that was morally pure.[68] Pregnant teenagers were a visible cue that students at a particular school were engaging in sexual behavior, which was well outside acceptable social norms at the time.[69] Expelling pregnant

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60. *See id.* at 143 (noting that the mission of maternity homes was to sequester pregnant young women until they could give birth and surrender their children).

61. *See id.* at 72.

62. *See id.* at 102.

63. *See* Richard H. Helmholz, *Excommunication in Twelfth Century England*, 11 J.L. & RELIGION 235, 235-36 (1995); Nathan B. Oman, *Preaching to the Court House and Judging in the Temple*, 2009 BYU L. REV. 157, 187-88 (discussing the practice of excommunication in the Mormon faith).

64. *See* Sylvia R. Lazos Vargas, *Deconstructing Homo[geneous] Americanus: The White Ethnic Immigrant Narrative and its Exclusionary Effect*, 72 TUL. L. REV. 1493, 1530-35, 1555 (1998).

65. *See id.*

66. *See* FESSLER, *supra* note 6, at 102.

67. *See id.*

68. *See id.* at 72.

69. *See id.*

teenagers, or at least banishing them from school for the duration of their pregnancies, became the "solution" to the "problem" of teen pregnancy.

c. Health risks.—Misconceptions about a pregnant woman's physical capabilities contributed to the practice of excluding pregnant students from school or at least from school activities and programming.[70] The schools justified the exclusion with the convenient belief that it would protect the student from potential physical harms lurking in the school halls.[71] Pregnancy, even today, is often perceived as a state of physical delicacy, and pre-Title IX school administrators justified their decision to remove a pregnant student from school by simply stating that her health might be at risk by jostling in the halls or participating in gym class.[72] School administrators claimed without merit that her physical safety was at risk if she stayed in school, which allowed administrators the opportunity to appear thoughtful and caring while denying the student access to education. Protecting pregnant women from the world was not unusual in the pre-Title IX days,[73] however, and school most certainly would have seemed to society an unsafe place for young pregnant women.

d. Physical and emotional limitations.—Another convenient excuse raised by schools to justify barring pregnant students was that expulsion was better than continued school attendance for the physical and emotional well-being of young pregnant women.[74] To a certain extent, school administrators in the pre-Title IX era and still today understood the trials pregnant students could suffer in school and may have believed that the best way to solve the problem would be to remove the student from the discomfort of being in school.[75] School desks, for example, were not designed to adjust to a pregnant girl's ever-changing shape. Physical education classes could not accommodate a pregnant student, and class schedules may have posed problems for sick or exhausted pregnant students. It was also difficult for schools to monitor and control the emotional toll pregnancy may cause a teenager. Combining all of the perceived negative effects surrounding student pregnancy, ill-founded as they often were, school administrators seemed to believe expulsion served as an attractive and reasonable response to the challenges.

The multitude of seemingly reasonable excuses for which a pregnant teen could be removed from school made it a simple and often fairly automatic process to remove pregnant teens from school, and there were no safeguards to allow them to continue their education if they did not have parents who were inclined to help them do so.[76] In the 1970s, however, society began to understand

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70. *See* PILLOW, *supra* note 27, at 102.

71. *See id.*

72. *See id.*

73. *See id.*

74. *But see* Ordway v. Hargraves, 323 F. Supp. 1155, 1156-58 (D. Mass. 1971) (holding that the mental and physical health of a young pregnant student did not put her at risk if she continued attending school).

75. *See id.*

76. *See* FESSLER, *supra* note 6, at 72.

that expelling pregnant students was a serious punishment imposed where no crime had been committed. Years after Title IX was passed to require equal treatment of girls in schools that receive federal funding, federal regulators realized that more instruction was needed for schools to properly implement Title IX. The Regulations were written, in part, to bar schools from falling back on their default practice of expelling pregnant teens.[77]

2. The Intent of the Title IX Regulations to Guarantee Access.—In light of the commonly held belief that pregnant girls should not be permitted to continue their education during their pregnancy, in 1975 HEW drafted provisions of the Regulations that prohibited expulsion.[78] The most fundamental of the Regulations prohibits the exclusion of pregnant teenagers from federally funded public schools' ("Recipient(s)") educational programs or activities, including extracurricular activities.[79] There are exceptions to this rule for situations in which pregnant girls may choose to engage in activity that may pose physical or emotional risks, but those exceptions are limited.[80] Recipients may require signoff from a pregnant student's physician that she is capable of participating in an activity that might raise health or emotional concerns, but only if other students who have physical or emotional conditions also require a physician's signoff to participate.[81] The prohibition on exclusion of pregnant girls is short and sweet, but not necessarily effective.

B. Goal Two: Choice

Not every school in the pre-Title IX era permanently expelled pregnant students, but many schools essentially shunned them while their pregnancies were visible.[82] Pregnant young women were generally not consulted when their parents and school administrators decided it was best to hide them for the duration of their pregnancies. Some pregnant teens were sent to private homes for unwed mothers; some were kept in the confines of their parents' homes until after delivering the baby; and some were sent to work for families in distant locations who would, in turn, pay for their stay in an unwed mothers' home at the end of the pregnancy.[83] Regardless of the options, the choice was not the young pregnant woman's to make. If the pregnant student was given the rare chance to choose where she wanted to stay for the latter part of her pregnancy, her decision

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77. *See* 34 C.F.R. § 106.40(b)(1).

78. *Id.* § 106.40(b)(1)-(2).

79. *Id.* § 106.40(b)(1).

80. *Id.* § 106.40(b)(2) ("A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.").

81. *Id.*

82. *See* FESSLER, *supra* note 6, at 133-54.

83. *See id.*

generally did not include the school she attended when she became pregnant.[84]

1. Alternative Schools/Homes as a Rule.—If a pregnant student was lucky enough to be given an alternative to staying in the school she attended, her options were quite limited.[85] In the decades before Title IX, young people were beginning to explore sexually at much higher numbers than the preceding decades.[86] Not surprisingly, the number of pregnant teens rose steadily throughout those same years, and many schools, families, and communities found themselves with expanding numbers of teen pregnancies to address.[87] If they could afford it, many parents resolved the problem of their pregnant teen by removing her from the school she attended when she became pregnant and sending her to a distant community to stay at a home for unwed mothers.[88] Some parents simply forced their pregnant daughters to stay home, indoors, until they delivered.[89]

Before Title IX, most public schools did not have publicly funded alternatives to offer their pregnant students; so those whose parents could afford it were sent to private homes for unwed mothers.[90] The homes were mostly intended to give girls a place to hide during their pregnancies. Some did provide instruction through tutors or, on occasion, more formal classroom instruction in certain subjects.[91] Pregnancy homes were neither required to provide education to pregnant teens, nor were the parents and schools who sent them there particularly focused on providing these young women an education.[92] School districts often provided tutors so girls could continue their education while at a home, but that service was provided out of the goodness of the local school district's heart and was not the norm.[93]

2. The Intent of the Title IX Regulations to Require Choice.—The long history of excommunicating pregnant girls to far away homes during their pregnancies left an indelible scar on those girls who endured the practice.[94] Perhaps for this reason, the drafters of the Regulations recognized that pregnant students should have the right to stay in the schools they attended when they became pregnant.[95] If, however, the student does not feel comfortable continuing her education in her home-base school, the Regulations allow her to choose to

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84. *See id.*

85. *See id.*

86. *Id.* at 29-34. The percentage of sexually active girls increased steadily from the 1920s through the 1970s, with studies showing that 39% of girls admitted to having had engaged in sexual intercourse in the 1950s and by the early 1970s, that number rose to 68%. *Id.* at 29.

87. *Id.* at 29-30.

88. *Id.* at 101-32.

89. *Id.* at 72-74.

90. *See id.* at 134.

91. *Id.* at 139, 157, 273.

92. *See id.*; *see also* PILLOW, *supra* note 27, at 143-49.

93. *See* FESSLER, *supra* note 6, at 139.

94. *See id.* at 138-39.

95. 34 C.F.R. § 106.40(b)(3) (2009).

attend an alternative school that provides a comparable education to the one she would receive at her original school.[96] The Regulations leave the choice expressly to the student.[97]

C. Goal Three: Quality Education for Pregnant Teens

Before the Regulations, pregnant teens tended to receive little or no education during their pregnancies.[98] The purpose of alternative institutions was to hide pregnant teens, not educate them.[99] If a teen did find a way to stay engaged in some sort of educational programming, there was no requirement that the education she received be quality or related to the one she would have received in school.[100] As a result, any education offered at alternative homes was often practical and directed toward an unmarried mother regardless of whether the pregnant young woman would be raising the baby. It frequently included training on budgeting and household management, child development, vocational skills, and discussions about how to become responsible adults.[101] This lack of a guarantee of a quality education was among the ills regulators sought to change when they implemented the Regulations.

1. Alternatives to Mainstream Schools Were Academically Inadequate.—In the years prior to the enactment of Title IX, the perception of young women's educational needs was changing. No longer were school-aged girls kept out of school to stay home and learn the basics of running a household.[102] Young women were expected to attend school and receive at least a basic pre-college education, and many young women were even prepared for and expected to attend college.[103] Yet despite these changing attitudes, educating young women often was considered somewhat of a luxury, because as adults they were expected to stay at home, get married, and raise children.[104] The purpose of having a young woman attend school was likely more focused on ensuring that she experience life outside of her parents' home long enough to meet someone who could provide for her when she was old enough to marry.[105]

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96. *Id.*

97. *Id.*

98. *See supra* Part I.B.1.

99. *See* FESSLER, *supra* note 6, at 134, 142.

100. *See* PILLOW, *supra* note 27, at 143-49.

101. *Id.* at 146.

102. *See* John L. Rury, *Vocationalism for Home and Work: Women's Education in the United States, 1880-1930*, HIS. EDUC. Q., Spring 1984, at 21, 21.

103. *See id.* at 21-22.

104. *Id.* at 24 (homemaking classes, in the form of home economics courses in school, were "to prepare women for their roles in sustaining the central institution of modern industrial society: the family").

105. *Id.* at 25 ("Advocates of home economics pointed out that most women only worked four or five years before getting married. Hence the principal work of women's lives was housework, and the schools should assume responsibility for guaranteeing that they knew how to carry it out.").

As a result of these attitudes, the stakes were even higher for a young unmarried woman who became pregnant while in school. Such a scandal could only reduce her chances at traditional homemaking.[106] So the options for many families faced with a decision about what to do with their pregnant teen became even more limited. The family's goals became to avoid public scrutiny and to get her out of the environment where she became pregnant.[107] That priority essentially guaranteed that her formal education would stop during her pregnancy, because she was either hidden at home, or because, although alternative homes for pregnant young women may have provided some education to their residents,[108] there was no requirement that it would be a quality education.

As the passage of Title IX drew near, it appeared that school districts were taking note of the unfairness of the lack of education for pregnant girls and began to address the problem, albeit somewhat poorly.[109] Although education about mainstream subjects may have been included in the curriculum, it appeared that schools deemed homemaking and childcare a crucial complement to the substantive education the pregnant girls received.[110] Interestingly, pregnancy schools that taught homemaking and childcare likely considered themselves highly advanced in their treatment of students because not only did these schools educate pregnant girls, they did it without assuming that the student would give her baby up for adoption, as was the norm at the time.[111] Although it may have been somewhat innovative to educate pregnant students, the emphasis on skills instead of substance left pregnant students unprepared to provide for their babies or, if they surrendered their babies for adoption, for life after pregnancy.

2. The Intent of Title IX Regulations to Mandate Quality.—Regulators understood that guaranteeing an education to pregnant students carries little or no value if that education is not comparable to that which she received before she became pregnant.[112] As a result, the Regulations contain language that mandates alternative schools for pregnant students be of comparable quality to the mainstream schools.[113] Comparable education for pregnant teens helps ensure that they can realize their post-school goals without interruption. The Regulations requiring a quality education for pregnant students are short, but presumably they stand for the much larger proposition that schools must review their educational goals and plans for non-pregnant students and make efforts to ensure that those goals and plans are duplicated in alternative schools for

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106. *See* PILLOW, *supra* note 27, at 144.

107. *See* FESSLER, *supra* note 6, at 67-99.

108. *See* PILLOW, *supra* note 27, at 58-61.

109. *See, e.g.*, SCHREIBER & DAY, *supra* note 47, at 5 (describing a goal of the New York City program for alternative schools for pregnant students that was "[t]o increase the skills of the participating girls in infant care and allied homemaking areas").

110. *See id.*

111. *See* FESSLER, *supra* note 6, at 176-205.

112. *See* 34 C.F.R. § 106.40(b)(3) (2009).

113. *See id.*

pregnant students. Unfortunately, the Regulations offer only thin protections that do little to protect students from the reality that little has changed since the Regulations were implemented.

II. THE REGULATIONS MUST BE STRENGTHENED TO BETTER ENFORCE TITLE IX AND PROTECT PREGNANT STUDENTS

The Regulations are incomplete, vague, and give schools too little guidance about how to behave lawfully with respect to their pregnant students. Further, the Regulations give federal agencies little power to ensure compliance. Although the Regulations, as a whole, provide guidance on a wide variety of areas governed by Title IX, including military educational institutions, admissions, recruitment, athletics, and employment, the specifics about how schools should address the education of pregnant students are sparse.[114] The provisions that regulate access, choice, and quality in education for pregnant students are almost as short and broad as the language of Title IX itself. The broad language of Title IX did little to protect girls before the Regulations were enacted.[115] Unfortunately, it appears that the weak and vague language of the Regulations with respect to pregnant students has also failed to protect them from discrimination.

Growing frustration with the impotence of federal agencies in enforcing civil rights statutes, including Title IX, spurred civil rights advocates to file lawsuits demanding that the government hold violators accountable for their unlawful behavior.[116] In the early 1970s, Title VI, also known as the Civil Rights Act of 1964, and its attendant regulations were at the center of several lawsuits brought to force the government to enforce the legislative mandates therein.[117] The instigators of the lawsuits sought to require communities to provide people of color equal opportunity to exercise their right to vote, to an equal education, and to equal access to services.[118] At the same time, Title IX was passed with no regulations clearly delineating what behavior was prohibited or required to comply with the new law.[119] As a result of this statutory and regulatory silence, schools operated in much the same fashion they had before Title IX was passed.[120]

Unfortunately, after a three-year delay in passing regulations to clarify the requirements of Title IX, educational opportunities for pregnant students

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114. *See id.* §§ 106.1-106.71.

115. *See* discussion *supra* Part I.B.1.

116. *See generally* Women's Equity Action League v. Cavazos, 879 F.2d 880, 881 (D.C. Cir. 1989) (discussing the nearly twenty years of civil rights litigation that attempted to improve Title IX enforcement).

117. *See id.* at 882-84.

118. *See, e.g.*, Adams v. Richardson, 480 F.2d 1159, 1165-66 (D.C. Cir. 1973) (enforcing school desegregation).

119. 20 U.S.C. § 1681(a) (2006).

120. *See* 1980 COMMISSION R., *supra* note 5, at 2-4.

remained elusive at best. Little to no effort was made to determine what schools were out of compliance. Little to no enforcement commenced, and the complaints that trickled in were not taken seriously by HEW, which was tasked with implementing and enforcing the Regulations.[121] Lengthy and complex litigation was commenced to force the government to properly enforce the Regulations, but it failed to bear fruit for the plaintiffs.[122] The Regulations ultimately, even if fully and properly implemented and enforced, are still too weak to force compliance, which results in a system that remains extremely ineffective at requiring schools to provide a quality education to pregnant teenagers. Further, weak guidelines regarding how to lawfully advise a pregnant teen about her options leave open the real possibility that schools can discriminate against pregnant teens.

There are several reasons the Regulations are weak. First, they have no specific mandates requiring schools to report the numbers of pregnant students who drop out of school, choose to attend alternative schools, or what academic requirements are in place for pregnant students at alternative schools. Second, they do not provide adequate enforcement mechanisms to catch violations of the Regulations and Title IX when they occur. Third, they do not require routine reviews of Recipients. Fourth, the provision requiring that any alternative education available to pregnant students must be comparable to that available to non-pregnant students fails to include specific strictures to ensure that pregnant students are not receiving inferior opportunities. Fifth, the Regulations lack directives for school administrators in the role of advising pregnant students about their options and rights under Title IX.

A. Reporting Requirements

Reporting requirements in federal statutes are effective and common tools to help the government evaluate the effectiveness of the statutes themselves and their attendant regulations.[123] It is difficult for regulators to enforce, amend, or properly implement federal laws and regulations if there is no empirical evidence that they do or do not operate and protect as intended. Mandatory reporting could provide such empirical evidence. Regulators may believe that reporting is not necessary, and the best way to determine whether regulations are effective is to look at how many enforcement actions are filed in a given year, for what purpose they are filed, and how often the claimant wins the challenge. But that would be at best an incomplete picture of the legal landscape for pregnant teens

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121. *Id.* at 3-6.

122. *See infra* Part II.B.1.

123. *See, e.g.*, 34 C.F.R. § 100.6 (2009). The Title VI civil rights regulations are incorporated by reference into the Regulations, *see id.* § 106.71, but they are more effective because they contain specific language offering an example of the kind of data Recipient schools should collect: "For example, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of and participants in federally-assisted programs." *Id.* § 100.6(b).

in school.

There are several reasons why a pregnant teen might not want to sue her school for Title IX violations during her pregnancy. Pregnancy is a temporary state, and because those who are meant to be protected by the Regulations are young and likely going through a dramatic and potentially traumatic life change, it is probable that many choose to forego their legal options (or are unaware of their legal options) in favor of the path of least resistance. As a result, many teens may choose to drop out of school or attend an inferior alternative school in order to avoid engaging in a legal battle that they may not win. Also, bringing a legal challenge can be expensive and time consuming. Mandatory reporting is one tool that regulators could use to discern whether a problem exists in a particular school, without relying on scared pregnant teenagers to act as private attorneys general.

1. Problem—The Regulations Do Not Have Reporting Requirements Isolating Pregnant Students.—From their inception, the Regulations have not required the Department of Education (the "Department") (or its predecessor, HEW) to collect any information related to teen pregnancy in schools.[124] The Department's Office of Civil Rights (OCR) is required to keep Title IX compliance data.[125] The Regulations require, however, only that Recipients conduct self-evaluations to determine whether they are in compliance with federal law.[126] The Regulations adopted and incorporated the procedure provisions in Title VI of the Civil Rights Act,[127] which are more comprehensive but do not specifically require data to be kept regarding pregnancy in secondary schools.[128] No federal or state entity regularly collects or keeps data on dropout rates of pregnant students, the transfer rates to alternative schools, or the graduation requirements at alternative schools.[129]

At least two government studies have conceded that the Regulations lack reporting requirements.[130] In 1985, the U.S. House of Representatives Select Committee on Children, Youth, and Families released a report that conceded the problem with the lack of reporting requirements: "Beyond collecting information on the number of births to teens, States are unable to answer the most basic questions related to teenagers at risk, pregnant, or parenting teens, including: where they are being served, what benefits they are receiving, who finishes high

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124. *See* 1980 COMMISSION R., *supra* note 5, at 16-17 (stating that no data collected by the National Center for Educational Statistics could indicate possible discrimination).

125. *See* 34 C.F.R. § 106.71 (incorporating by reference "procedural provisions applicable to Title VI of the Civil Rights Act of 1964").

126. *Id.* § 106.3(c).

127. *See id.* § 106.71.

128. *See id.* § 100.6.

129. *See* PILLOW, *supra* note 27, at 80-81, 92-97.

130. SELECT H. COMM. ON CHILDREN, YOUTH, AND FAMILIES, 99TH CONG., TEEN PREGNANCY: WHAT IS BEING DONE? A STATE-BY-STATE LOOK 47 (Comm. Print 1985) [hereinafter SELECT H. COMM.]; 1980 COMMISSION R., *supra* note 5, at 13.

school and who finds employment."[131] A study conducted by the U.S. Commission on Civil Rights in 1980 deemed data collection regarding general inequities in schools and the compliance reviews required of OCR to be inadequate.[132] Even if the federal or state governments did regularly collect such data, they would not be required to analyze it, use it to improve regulations, or continue collecting it, because the Regulations lack those requirements.[133]

A scan of the Department website confirms that the Department regards Title IX primarily as an athletics-equalizer.[134] The Department's "Fast Facts" highlight "participation in athletics," but hardly mention pregnancy.[135] The CRDC webpage describes data about public school students collected by OCR, which includes enrollment, education services, and academic proficiency results information.[136] The information is disaggregated on a few demographic categories: race/ethnicity, sex, limited English proficiency, and disability.[137] Upon further inspection, the sex and disability categories (the only two that could or should contain information about pregnant public school students) have no breakout of information for pregnant students.[138] It is possible that the CRDC does not collect pregnancy statistics for students because it does not consider it to be a civil rights issue,[139] in which case it would be appropriate for the Department to direct another of its agencies to collect the data, but it does not.

In addition to the CRDC data collection, the National Center for Education Statistics (NCES) collects data about educational attainment for various demographic groups, none of which regularly include pregnant students.[140] Race, ethnicity, and sex are analyzed with respect to dropout rates, college attendance, college graduation rates, and other basic educational attainment information frequently because of a congressional mandate that dates back to the mid-1800s.[141] Although some information regarding pregnant students is available,

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131. SELECT H. COMM., *supra* note 130, at xiii.

132. *See* 1980 COMMISSION R., *supra* note 5, at 12-17.

133. *See* C.F.R. §§ 106.1-106.71.

134. National Center for Education Statistics, Fast Facts, http://nces.edu.gov/fastfacts/display.asp?id=93 (last visited Nov. 3, 2009).

135. *See id.*

136. *See, e.g.*, Civil Rights Data Collection 2006, http://ocrdata.ed.gov/ocr2006rv30.

137. *Id.*

138. *Id.*

139. Congress has in other statutes considered pregnancy a civil rights issue. *See* Newport News Shipbuilding & Drydock Co. v. EEOC, 462 U.S. 669, 684 (1983) (noting that "for all Title VII purposes, discrimination based on women's pregnancy is, on its face, discrimination because of her sex"). Unlike Title IX, however, Title VII has been amended to expressly prohibit pregnancy discrimination. *See* 42 U.S.C. § 2000e(k) (2006).

140. *See* National Center for Education Statistics, http://nces.ed.gov (last visited Apr. 6, 2009).

141. *See, e.g.*, SNYDER ET AL., DIGEST OF EDUCATION STATISTICS 2007 (2008), http://nces.ed.gov/pubs2008/2008022.pdf (collecting information regarding particular classes of people, but not pregnant students).

it is not regularly collected or analyzed and is often out of date.[142] The existence of some data is the exception that proves the rule; the data can be, but is not regularly, collected.[143] Unless Congress, or the executive branch, through its regulatory function, requires that NCES implement specific, regular data collection efforts about pregnant teens, history indicates no such collection will be done.

Without tracking data to determine how many pregnant students are dropping out of school, transferring to alternative schools, or missing so many school days that they must be held back, it is nearly impossible to proactively identify discrimination against pregnant teens. Gathering data about pregnant students' schooling will not only show if problems persist, but it will also indicate if successes have been achieved. Data showing which schools have programs that allow pregnant teens to succeed would also help regulators pinpoint schools for study that have excelled in educating pregnant students. Observing the successful programs can help regulators build models for schools whose data indicates a problem with how pregnant teens are treated. Understanding the problems and studying the successes are the only ways regulators can begin to understand the current state of education for pregnant teenagers and improve it in the future. But, in part due to the lack of reporting requirements in the Regulations, the Department is not focused on teen pregnancy.[144]

Without data, there is no way to consistently and specifically track information about the Regulation's three pregnancy-related goals.[145] Data must be collected to monitor dropout rates among pregnant teens that will help regulators pinpoint trouble spots. Also, information about how many students attend alternative schools would be instructive when regulators need to diagnose where schools might be pushing pregnant students out of mainstream education. And last, data about the quality of education available at the alternative schools must be collected and analyzed to help regulators ensure that the separate educational opportunities offered there indeed are equal. The Regulations must reflect the importance of this information to those who are governed by them, starting with dropout rates.

a. Dropout rates.—As stated above, NCES regularly collects and publishes data regarding the percentage of young people who drop out of school.[146] The data is disaggregated by a number of demographic characteristics, including

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142. *See, e.g.*, U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, STUDENT EFFORT AND EDUCATIONAL PROGRESS, HIGH SCHOOL SOPHOMORES WHO LEFT WITHOUT GRADUATING WITHIN 2 YEARS, EDUCATION LONGITUDINAL STUDY OF 2002, tbl. 27-3 (Jan. 2006) (previously unpublished tabulation), http://nces.ed.gov/programs/coe/2006/section3/table.asp?tableID=485.

143. *See id.*

144. *See, e.g.*, 34 C.F.R. § 106.71 (2009).

145. *Id.* § 106.40 (explaining the goals of access, choice, and equality).

146. JENNIFER LAIRD ET AL., NAT'L CTR. FOR EDUC. STATISTICS, PUBL'N NO. NCES 2008-053, DROPOUT AND COMPLETION RATES IN THE UNITED STATES: 2006, at 1-2 (2008), http://nces.ed.gov/pubs2008/2008053.pdf.

race/ethnicity, sex, and socioeconomic class status.[147] Whether a student was pregnant when she dropped out of school is not a statistic in that regular data collection, or in any other regularly kept statistical analysis conducted by NCES, the National Center for Health Statistics, or any other federal agency charged with collecting similar data.[148] In fact, little information is available about the educational attainment of pregnant teens at the federal, private, or state level, despite the histrionics public officials engage in when discussing the problem of teen pregnancy.[149] Although the lack of regular data is clear, occasionally data is collected regarding pregnant students.

Two NCES studies help illustrate the problem with the paucity of federal requirements on Recipients to collect data regarding pregnant teens in the Regulations. First, in 2004, NCES published a report about gender equity in U.S. education institutions ("NCES Report") that included some data regarding the educational attainment of childbearing teens, such as the graduation rates of girls who bore at least one child in high school between 1988 and 2000.[150] Even though the NCES Report has useful dropout rate information about girls who bore children during high school, it does not segregate information about pregnant students. This may seem a subtle distinction, but it is an important one. Pregnancy is a fleeting characteristic that is hard to track and does not necessarily result in parenthood; therefore, discriminatory action taken by schools to force out pregnant students can slip past regulators if parenting female students are lumped together with pregnant students in the data.

Although it may be heartening that some official statistics do exist regarding high school girls' dropout rates when they bear children before graduation, the information is not particularly instructive when used to evaluate whether Title IX is actually protecting pregnant students. The statistics in the NCES Report show that 29.4% of girls who were in eighth grade in 1988 and had a child either during eighth grade or in high school did not complete high school.[151] This statistic is telling in two ways. First, its existence proves that information relating to a young woman's parental status is collectable, which might, or at least should, have been a concern of those who wrote the regulations governing Title IX. Certainly, a mandate that the federal government should gather information about a girls' pregnancy status may raise privacy concerns. However, the fact that the government has developed a system to gather information about parental status shows that collecting information about pregnancy status and educational achievement on a regular basis is not impossible.

The second reason the childbearing statistic is significant lies in the

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147. *Id.* at vi-viii, 2-6.

148. *See* PILLOW, *supra* note 27, at 80, 94-97.

149. *See id.*

150. CATHERINE E. FREEMAN, NAT'L CTR. FOR EDUC. STATISTICS, PUBL'N NO. NCES 2005-016, TRENDS IN EDUCATIONAL EQUITY OF GIRLS & WOMEN: 2004, at 58-59 (2004), http://nces.ed.gov/pubs2005/2005016.pdf.

151. *Id.*

information itself. Nearly one-third of female students who had a child during high school dropped out of high school, and that number only includes those young women whose parenting status was known and divulged on the survey. Isolating dropout information about pregnant high school students would shed light on the question of whether Title IX is living up to its promise of protecting pregnant girls from discrimination that bars them from realizing their educational goals.

Another telling study conducted by NCES regarding pregnancy was released in 2006, when the NCES published a data table showing what caused high school sophomores to drop out of school.[152] The table shows the top reasons why students left school.[153] The availability of this table is instructive for two reasons. First, it was the only one of its kind (i.e., including information about pregnant students) that appeared in a search for the word "pregnant" on the NCES website. Second, the percentage of female sophomores dropping out of school because of pregnancy (27.8%) was startlingly high.[154]

The fact that teenage mothers have a high dropout rate is not helpful to determine whether educational institutions are violating Title IX by encouraging or requiring pregnant students to drop out of high school. Dropout information when disaggregated to include pregnant students as a specific group could be extremely helpful to regulators in their enforcement and education efforts with respect to Title IX. The more specific the information, the more regulators can do to diagnose problems and intervene. Further, information about the number of alternative schools that exist, the graduation rate of pregnant students from alternative schools, and other crucial details about alternative education options could contribute greatly to determining the efficacy of the schools.

b. Information about pregnant students who attend alternative schools or programs.—The only information available about alternative programs for pregnant students is anecdotal and indicates an inability to assess where such programs exist and if they are effective. The NCES, in an effort to determine the feasibility of surveying schools via automatic systems, asked schools to report how they kept data on various subjects, including information regarding the "instructional setting for pregnant students."[155] Ironically, there is no indication that the NCES ever actually collected information on the topic.[156] It is clear that

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152. *See* NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 142.

153. *Id.*

154. *Id.*

155. *See* WENDY MANSFIELD & ELIZABETH FARRIS, NAT'L CTR. FOR EDUC. STATISTICS, PUBL'N NO. NCES 92-130, OFFICE FOR CIVIL RIGHTS SURVEY REDESIGN: A FEASIBILITY SURVEY 23 (1992), http://nces.ed.gov/pubs92/92130.pdf.

156. *See* National Center for Education Statistics, Publications & Products Search, http://nces.ed.gov/pubsearch/index.asp (last visited Apr. 8, 2009). A search for "pregnant" in all publications and survey and program areas, from January 2000 to present, yielded no results. A search specifically geared to determine if the Fast Response Survey System, which was the system that resulted from the feasibility study that included the "instructional setting for pregnant students" survey item, collected data about the topic also yielded no results. For the feasibility study, see

the NCES has the capability of collecting data about alternative programs in school districts that operate them, as evidenced by the feasibility survey, which indicated that the schools surveyed collected data automatically and in paper form about alternative schools for pregnant students.[157] The mere ability to do so, however, cannot be trusted to yield enough consistency to help regulators monitor schools that are required to follow federal mandates.

After the Supreme Court decision in *Brown v. Board of Education*,[158] the phrase and concept of "separate but equal" has been much maligned, for good reason, by courts and scholars alike.[159] There are circumstances, however, when the concept of separating the educational setting for certain students from other students might be lawful and just. Separating pregnant students from mainstream students, when pregnant students so choose, may be one of those circumstances. Even though that mandated choice allows students to choose which school they would like to attend, the risk remains that some schools may force their pregnant students into an alternative school, thus subjecting them to inferior education. Knowing the rate at which pregnant students attend or drop out of alternative schools, and whether the academic rigor at alternative schools is on par with mainstream schools would help regulators determine whether the "separate but equal" concept in the pregnancy context runs afoul of federal law.

It would obviously be instructive to regulators interested in evaluating the efficacy of alternative schools to know how many of these schools exist. Even more helpful, though, would be information about the number of pregnant teens who attend alternative programs in a particular district. Knowing the raw information about how many students attend alternative programs would be useful, as would knowing whether pregnant teens made the decision to attend those schools without pressure or influence from school administrators or teachers. A survey tailored to catching the potential harms intended to be rectified through the federal regulations would allow regulators the opportunity to focus their enforcement efforts in the right places.

c. Academic requirements of pregnant students.—The Regulations require that a pregnant student's education in an alternative school be comparable to that which she would have received were she not pregnant, but they are not clear about what "comparable" means.[160] The ambiguity leaves open important questions: Do pregnant teens have to be in school for a certain number of days? Do they have to take the same courses non-pregnant teens have to take to graduate? Do they have to make up coursework that they have missed or inadequately completed? Additionally, it leaves open questions about alternative

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MANSFIELD & FARRIS, *supra* note 155.

157. *See* MANSFIELD & FARRIS, *supra* note 155.

158. 347 U.S. 483 (1954).

159. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 120 (1995) ("In the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." (quoting *Brown*, 347 U.S. at 495) (alterations omitted)); Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461 (2003).

160. *See* 34 C.F.R. §§ 106.34(c), 106.40(b)(3) (2009).

and mainstream educational programming: What courses are required of pregnant students? What courses are available? What optional courses do most students take? Just having to answer questions about their curricular options for pregnant students might help schools think about how better to comply with the Regulations, but the information is crucial to regulators to identify schools that put pregnant students on the "mommy track."[161]

The rigors of schooling should not change when educating pregnant students, but the methods of how those students receive that education may need to. Requiring that alternative schools be comparable to mainstream schools should mean that pregnant students can expect to learn the same subjects they were learning in their pre-pregnancy school. It should also mean that the instructional quality of the alternative school should be comparable to the quality of instruction they received in their mainstream school. The Regulations do not require that schools gather and report any information from students attending alternative schools to see if they perceive their education to be comparable to that which they were receiving before transferring. This lack of information makes it difficult to determine whether they are receiving a comparable education and is evidence that stricter, clearer regulations should be implemented.

2. Solution—Reporting Requirements About Pregnant Students.—The lack of reporting requirements in the Regulations severely limits regulators' ability to track and assess how schools treat pregnant students. Currently, the compliance provisions for Title IX are incorporated by reference to the compliance provisions in the regulations for Title VI.[162] The Title VI regulations have specific language that gives regulators a benchmark to judge the quality of the information schools file to comply with their federal mandate.[163] The added specificity to help schools and regulators track compliance with respect to race issues in the Title VI compliance regulations, however, is still somewhat vague: "For example, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of and participants in federally-assisted programs."[164] The Regulations need to include their own compliance provisions, and those provisions must be clear and explicit about the type of information schools must report.

The systems that are in place to collect data on the various demographic categories are already adequate to capture most of the information needed to determine whether public schools are addressing pregnant students' academic needs. The CRDC has an established process that the government implements yearly to collect invaluable data about selected public schools. This data can be relied upon to reassess academic programming where deficiencies exist. Right

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161. Jane Gross, *2005: In a Word; Daughter Track*, N.Y. TIMES, Dec. 25, 2005 (describing the "mommy track" as "the exodus of many young professional women from the workplace . . . . with the expectation that when their children needed them less they would find a way to return").

162. 34 C.F.R. § 106.71; *see id.* § 100.6.

163. *Id.* § 100.6.

164. *Id.* § 100.6(b).

now, the systems are not being utilized in a way that helps regulators or schools assess their success at educating pregnant students. The Regulations should be amended to make explicit the type of information schools should report. Specifically, the Regulations should require data collection about dropout rates for pregnant students, the number of students who attend alternative schools, and the academic rigor, or lack thereof, required of pregnant students.

a. Dropout rates.—Because the Regulations do not require that dropout rates among pregnant students be tracked, any data collection done by the NCES is not mandated or systematic.[165] Regular, yearly analysis of pregnant students' dropout rates would be a starting place for remediation, should it be necessary, at the local level. At the very least, requiring school administrators to report the academic setbacks suffered by pregnant students could raise awareness among those who can address the issues where they arise. Perhaps a reporting requirement would spark positive change for pregnant students in some areas and would help the federal government avoid getting involved at all. Schools may be unaware or willfully ignorant of a pregnancy-dropout correlation, and forcing them to report the numbers may encourage them to address problems that may be illuminated by the numbers.

The Regulations should include specific reporting requirements, mandating that schools provide regulators with regularly collected data about how many, and for what reasons, pregnant students drop out of school each year. For example, were the students asked or encouraged to leave, pushed to an alternative school they did want to attend, not accommodated if they experienced pregnancy complications that made it difficult to attend school, or did they drop out for reasons unrelated to the school's treatment of them during their pregnancy? The Regulations should require the Department to design a mandatory reporting form that schools must use to collect the required information and not leave it to schools to design their own data collection process. The new compliance provisions in the Regulations should begin: "Recipients must isolate information about pregnant students, including dropout rates and reasons for dropping out. The information must be reported regularly, but no less than every three years, to the Secretary." Recipients must use the form issued by the Secretary to collect the required information. This level of specificity should carry through to other new reporting provisions in the Regulations, including information about alternative schools.

b. Information about pregnant students who attend alternative programs.—The Regulations also should be revised to add a provision that requires school districts to report the number of pregnant teens who attend alternative programs each year. The Regulations do not require schools to provide alternative programs to pregnant teens, but to the extent that they are offered, regulators should know how many pregnant teens are in the programs. After the proposed compliance provision stated in the previous section, the Regulations should go on to state:

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165. *See* SELECT H. COMM., *supra* note 130.

> Recipients who offer alternative schools to pregnant students must also report to the Secretary on a regular basis, but no less than every three years, how many pregnant students attend those alternative schools in a given year and how many students, who are known to the Recipient to be pregnant, remain in the school they attended before becoming pregnant.

Although the suggested language would not capture every piece of helpful information, it may help notify regulators when schools run afoul of the mandate that pregnant students be allowed to choose where to attend school if an alternative is available.

Assumptions based on statistics can be deceiving. If, for example, a school district shows that 100% of pregnant teenagers attend an alternative school during their pregnancy, it may signal that the school administration is shuttling the teens out of their rightful mainstream educational opportunities into an inferior program. On the other hand, it could mean the exact opposite. Perhaps the alternative school is so good that pregnant teens see the opportunity as the best option to meet their educational goals.[166] The numbers alone cannot complete the picture, but when analyzed in conjunction with other information, such as where compliance "hot spots" have arisen in the past, the numbers can raise a flag signaling ongoing or future problems in particular schools.

Knowing the number of students who attend alternative schools would also give regulators valuable information about alternative schools in general. For example, information about where alternative schools exist that provide education to pregnant students in higher numbers could provide a context to study the effectiveness of the alternative programs. The data could also be used by scholars seeking to determine whether alternative programs can or should be improved. Schools could also use the data to track trends in alternative education for pregnant students, which may aid their decisions to start or close an alternative school, for example. Regardless of how the data showing how many students attend alternative schools is analyzed by itself, it could be even more helpful for regulators and educators to see how the information merges with dropout rates.

The convergence of these two pieces of crucial data—dropout rates and the rate pregnant teens choose alternative programs—can help inform regulators and school districts know how to better to serve pregnant students. It would be valuable to know if, for example, a school district that does not have an alternative program has a higher pregnant student dropout rate than school districts with alternative programs. Conversely, it would also be helpful to know how many pregnant students drop out of school in school districts that have alternative programs. A breakdown of how many students dropped out before

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166. Priscilla Pardini, *A Supportive Place for Teen Parents*, RETHINKING SCHOOLS ONLINE, Summer 2003, http://www.rethinkingschools.org/sex/teen174.shtml (discussing Lady Pitts High School in Milwaukee, which caters to pregnant and parenting students and boasts a 93% graduation rate).

entering an alternative program and how many dropped out after starting an alternative program might also be indicative of the efficacy of the alternative program. The data would not be conclusive evidence of problems in alternative programs (or the lack thereof), but it could be instructive and help regulators and educators start asking the right questions to discover where change is needed.

c. Academic requirements of pregnant teens.—The Regulations should also require that schools report their academic requirements for pregnant teens, regardless of what school they attend while pregnant. Schools should accommodate pregnant teens' physical and emotional needs during pregnancy; they should not be permitted to offer an inferior education that fails to prepare them the way they would have been prepared were they not pregnant. The Regulations should allow regulators to keep tabs on how schools are addressing academic requirements in mainstream schools, where pregnant students might need accommodation, and in alternative schools. The Regulations do not need to be so rigid as to specify what academic rigors a school should require, but they should require that schools report any deviations pregnant students encounter from the normal academic requirements. Such a mandate can point regulators to programs that are successfully addressing the challenges that accompany educating pregnant students and can warn regulators when schools impermissibly lower their standards for educating pregnant students.

Revised Regulations requiring self-reporting with regard to academic rigor should be simple and clear. The final sentence in the new reporting requirements in the Regulations should read: "Recipients must also report to the Secretary on a regular basis, but no less than every three years, any difference in graduation or promotion requirements (such as permissible number of missed days, academic requirements, or physical education options and alternatives) between pregnant and non-pregnant students." The flexibility permitted in the suggested language remains. For example, administrators can choose how to determine the number of absences to allow pregnant students before they are held back. All of the proposed reporting requirements give those charged with enforcing the Regulations the opportunity to evaluate, compare, and analyze the way schools in the United States treat pregnant students, and could be a starting point for change.

B. Enforcement

1. Problem—Title IX Does Not Have Adequate Enforcement Provisions to Protect Pregnant Students who are Expelled, Forced to Withdraw, Mistreated, or Forced into Alternative Schools.—In the 1980 Commission Report, the U.S. Commission on Civil Rights determined that federal agencies were not doing enough to adequately enforce Title IX.[167] The Report was written after years of Recipient non-compliance and government inaction, which initially was the

167. *See* 1980 COMMISSION R., *supra* note 5, at 2-6.

result of the HEW's failure to draft the Regulations.[168] Before the Regulations were implemented in 1975, but after Title IX was passed in 1972, victims of sex-based discrimination in schools throughout the country began an effort to hold HEW accountable for enforcing Title IX (and other federal civil rights statutes).[169] The battle lasted long after the Regulations were implemented, culminating in a decision that essentially relieved regulators of proactive enforcement requirements,[170] even though it was clear from the many court opinions issued throughout the fight that regulators were not engaged in adequate enforcement efforts.[171] As a result, the Regulations must pick up where the litigation failed.

Title VI of the Civil Rights Act of 1964 guaranteed African-American students educational opportunities equal to white students.[172] In 1970, a group of African-American students filed an action against HEW for failing to enforce that right and permitting school districts in seventeen southern and border states to continue receiving federal funding, despite their discriminatory practices.[173] The plaintiffs alleged that HEW's Office of Civil Rights, the Secretary of HEW, and the Attorney General deliberately failed to enforce Title VI and essentially extracted "the teeth" from the law.[174] The district court hearing the case granted the plaintiffs' prayer for injunctive relief, requiring HEW to commence proceedings against school districts out of compliance with Title VI.[175] The litigation was far from complete, however, because the federal government continued to lag in its enforcement obligations, and by 1976, other classes of complainants had been given permission by the U.S. Court of Appeals for the District of Columbia Circuit to intervene.[176]

On behalf of female students seeking to enforce the provisions of Title IX, which were also receiving little attention from HEW, the Women's Equity Action League (WEAL) intervened in the *Adams* litigation.[177] WEAL argued that HEW was permitting school districts to engage in sex-discriminatory practices in violation of Title IX.[178] WEAL was added into the schedule set in the earlier proceedings that required HEW to pursue all legitimate complaints in a timely manner and initiate compliance reviews of schools in the seventeen

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168. *See id.* at 3-5.

169. *See* Women's Equity Action League v. Cavazos, 879 F.2d 880, 882 (D.C. Cir. 1989), *supplemented*, 906 F.2d 742 (D.C. Cir. 1990).

170. *See* Women's Equity Action League v. Cavazos, 906 F.2d 742, 752 (D.C. Cir. 1990); *see also infra* text accompanying note 184.

171. *See Women's Equity Action League*, 906 F.2d at 744-46.

172. *See* 42 U.S.C. § 2000d (2006).

173. *See* Adams v. Richardson, 356 F. Supp. 92 (D.D.C. 1973).

174. *See Women's Equity Action League*, 879 F.2d at 881.

175. *See id.* at 881-82.

176. *See id.* at 882.

177. *See id.*

178. *Id.*

states included in the original *Adams* litigation.[179]

In 1977, the U.S. District Court for the District of Columbia approved a consent decree that settled several of the cases regarding HEW's lagging enforcement and issued an order, commonly known as the "*Adams* Order."[180] The *Adams* Order required federal authorities to enforce nationally Title VI, Title IX, and other federal directives regarding race, sex, national origin, and disability discrimination in a proactive and timely manner.[181] The *Adams* Order only operated effectively, according to the *Adams* plaintiffs, for a short period of time before the government again faltered in its enforcement efforts.[182] Upon a court directive to negotiate a revised order, the parties reached an impasse, and in 1982, federal officials sought to vacate the original *Adams* Order.[183] The parties continued to litigate their dispute until 1990, twenty years after the commencement of the lawsuit, when the U.S. Circuit Court for the District of Columbia ruled that the broad remedies sought by the plaintiffs were not legally cognizable.[184]

During the twenty years in which the dispute waged between federal officials and plaintiffs seeking enforcement of federal statutes and executive orders, the focus of the plaintiffs' arguments changed.[185] The D.C. Circuit, in the final court case held that by seeking broad judicial oversight of executive agencies, plaintiffs were requesting relief on grounds that the courts could no longer grant.[186] As such, even though it may have been true that federal agencies were not timely addressing female or minority students' complaints or initiating compliance reviews frequently or quickly enough, the federal courts were not (and are not) the right place to seek redress for those wrongs. The courts simply do not have the logistical capability to enforce such a broad directive.

As a result of the drawn-out, complex, and ultimately ineffectual litigation to require agencies to act on behalf of female, minority, disabled, or foreign students, there are only a couple of ways to improve the state of education for non-majority students. First, students may bring legal action directly against the school district for violations of federal law.[187] The only remedy available to

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179. *Id.* at 882-83.

180. *Id.* at 883.

181. *Id.*

182. *Id.* at 884.

183. *Id.*

184. *See* Women's Equity Action League v. Cavazos, 906 F.2d 742, 744 (D.C. Cir. 1990).

185. *See, e.g.*, Adams v. Bennett, 675 F. Supp. 668, 680 (D.D.C. 1987) ("[P]laintiffs do not claim that defendants have abrogated their statutory responsibilities, but rather that, in carrying them out, they do not always process complaints, conduct investigations, issue letters of findings, or conduct compliance reviews as promptly or expeditiously as plaintiffs would like."), *rev'd*, 879 F.2d 880 (D.C. Cir. 1989), *supplemented*, 906 F.2d 742 (D.C. Cir. 1990).

186. *See Women's Equity Action League*, 906 F.2d at 752 (holding that two doctrinal changes in the law required a "green light" from Congress for courts to permit litigation against federal agencies for a failure to enforce federal civil rights under Titles VI and IX).

187. *See* David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217,

students who have suffered discrimination in violation of Title IX is a non-discriminatory education.[188] Second, regulators can act proactively to evaluate school districts' compliance with federal regulations governing federal education civil rights statutes and can take action against schools not in compliance.[189] The first option leaves many gaps in the enforcement framework to adequately protect pregnant students, and the second option is not effective to combat pregnancy discrimination because proactive enforcement provisions are absent from the Regulations.

There are several problems with the first option as an adequate enforcement tool to deter pregnancy discrimination. Pregnancy is a temporary state, and the judicial process moves slowly.[190] By the time a teenager is able to secure even a preliminary injunction requiring her school administration to treat her equally, for example, she may be near, at, or past the end of her pregnancy.[191] Because the only reward for a successful pregnancy discrimination cause of action is an education comparable to that which non-pregnant students receive,[192] there is not much incentive for students to pursue it. Although adults in the same position may see the advantages to a solid education, many young pregnant women, perhaps failing to recognize the economic realities of their soon-to-be parent status, may not perceive its importance.[193]

The time, money, effort, and sophistication it takes to engage in civil rights litigation is likely far beyond a pregnant student, but the alternative, which requires proactive intervention by regulators, is not a viable option either. The Regulations incorporate by reference the Title VI enforcement procedures for violations of the regulations.[194] The "Procedures" section of the Title IX Regulations are actually entitled "Procedures [Interim]."[195] Those interim procedures, which appear to have been in place since their implementation in 1980, and have never been updated, simply refer the reader to the procedures for Title VI, which address enforcement in a few ways.[196] The procedures are nevertheless inadequate to timely intervene on behalf of pregnant students.

The Title VI regulatory procedures are vague and too broad to address compliance problems when schools discriminate against pregnant students. First, the Title IX Regulations lack their own procedures and incorporate instead

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218-19 (2005) (explaining that monetary damages are likely not available for pregnancy discrimination in school because the word "pregnancy" does not appear in the language of Title IX itself, only the Regulations thereto, and the Supreme Court has held that private rights of action cannot arise from violations of federal regulations, only violations of federal law).

188. *Id.*

189. *See* 34 C.F.R. § 100.7 (2009) (allowing periodic compliance reviews of Recipients).

190. *See* PILLOW, *supra* note 27, at 62.

191. *See id.*

192. *See* Cohen, *supra* note 187, at 218-19.

193. *See* PILLOW, *supra* note 27, at 62.

194. *See* 34 C.F.R. § 106.71 (2009).

195. *Id.*

196. *See id.* §§ 100.7-100.8.

regulations aimed at race discrimination, which are inadequate to isolate sex discrimination in schools.[197] Second, there is no expedited procedure for addressing complaints that are filed in time-sensitive situations, such as pregnancy discrimination.[198] The unique challenges presented in pregnancy discrimination situations are not addressed by the incorporated procedures in the Title VI regulations and require a stronger, clearer set of procedures aimed at stopping pregnancy discrimination.

2. Solution—Regulations Mandating Swift Action to Investigate and Address Alleged Violations.—The Regulations should include their own procedures for stopping pregnancy discrimination. Although procedures are generally transferable, especially in a similar legal context, such as with race discrimination and sex discrimination in schools, simply incorporating the regulations attached to Title VI is inadequate to address the unique problems that arise in pregnancy discrimination cases. During pregnancy, a student holds a unique legal status with unique legal problems that are quite different from the legal problems a minority student might encounter. Procedures governing Title IX must appear in the Regulations to, at the least, indicate that regulators understand that pregnancy discrimination raises special enforcement challenges. Moving the procedures from the Title VI regulations into the Regulations governing Title IX would be a good start, but would not solve problems raised by the fleeting status a pregnant student holds.

Once procedures are incorporated directly into the Regulations, they should be altered to specifically deal with the special issues presented by pregnancy discrimination and, at a minimum, require immediate investigation of complaints of pregnancy discrimination and immediate enforcement action. Because a student will be pregnant for a relatively limited time during her education, any violations of her right to an education should be rectified as quickly as possible. The Regulations should provide for an expedited investigation and hearing that allow a pregnant student to maintain her desired educational track until the hearing can commence. The language should read:

> Upon receiving a complaint regarding pregnancy discrimination, the responsible Department official, or his or her designee, shall commence an emergency proceeding to determine whether the complaint has merit. The proceeding shall culminate in a preliminary injunction or temporary restraining order, where appropriate, to ensure that relief can be achieved as quickly as possible.

In addition to swift action, regulators should also engage in regular reviews to ensure compliance.

C. Routine Reviews

The Department should be required to review schools' policies and attitudes

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197. *See id.* § 106.71.

198. *See id.* § 100.7.

about teen pregnancy to ensure that they are complying with the Regulations. A proactive approach to enforcement will help schools understand their obligations to pregnant teens and will protect pregnant students from discrimination based on ignorance or purposeful discrimination. The reviews can take many forms but should be conducted in such a way that schools with the highest likelihood of non-compliance receive higher scrutiny than other schools. That does not mean that schools that appear to have perfect track records (i.e., no formal complaints about pregnancy discrimination, low dropout rates, or few socioeconomic factors that indicate a high teen pregnancy rate) should not also receive review. It simply means that the Department should be thorough and review schools in every category. Currently, the Regulations lack specificity and thus, the regulators and Recipients cannot be on notice of the frequency and thoroughness of the reviews.

1. Problem—Title IX Regulations Do Not Require Routine Reviews of Public Schools' Treatment of Pregnant Students or Alternative Programs Offered.—The Regulations are not written specifically to require routine reviews of how schools treat pregnant students, and they do not require routine reviews of alternative programs that pregnant students attend.[199] The Title VI procedures, incorporated by reference into the Regulations, do require compliance reports to be filed with appropriate Department officials and require Recipients to allow Department officials who seek to launch an inquiry open access to their records.[200] The procedures in Title VI do not, however, include specific mandates for regular reviews; they do not address the unique challenges pregnancy discrimination raises for reviews; and they fail to mention alternative pregnancy programs altogether. The Regulations must make clear to regulators that reviews must be frequent, must address the time sensitivity of pregnancy discrimination, and must specifically require reviews of alternative programs.

The Title VI regulations require that Recipients of federal funds file compliance reports that show that they are following the directives of the federal law and the regulations implementing the law.[201] Those regulations, however, are geared toward detecting compliance problems with a federal statute prohibiting discrimination based on race and ethnicity.[202] The Title VI regulations require that Recipients keep and submit records to the designated Department official that can show that the Recipient "has complied or is complying" with the regulations.[203] The Department official responsible for reviewing the records has the power to specify what documents he or she would like submitted. The regulation provides: "For example, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of and participants in federally-assisted

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199. *See id.* § 100.7(a) ("The responsible Department official or his designee shall from time to time review the practices of recipients to determine whether they are complying with this part.").

200. *Id.* § 100.6(b)-(c).

201. *Id.* § 100.6(b).

202. *See id.*

203. *Id.*

programs."[204] However, this example is too broad to effectively guide administrators to stay alert for pregnancy discrimination. For this reason, the procedures aimed at requiring compliance in racial discrimination cases are inadequate to address pregnancy discrimination.

Although it does not take a particularly creative mind to extend the obvious implications of the Title VI regulations to enforce Title IX regulations, the vagueness of the language leaves such large gaps that more specific language requiring more proactive enforcement is necessary. There are many reasons for this. First, because Title IX and its attendant regulations have become so widely recognized as athletics-equalizers,[205] the need to inquire into schools' treatment of pregnant girls is likely not the main focus of Department officials tasked with enforcing Title IX. More specific enforcement provisions would force Department officials to be more proactive about rooting out pregnancy discrimination. Second, for a multitude of reasons, pregnant teenagers do not often seek to enforce their rights when they have faced pregnancy discrimination,[206] and this leaves a void that must be filled by those with the resources, time, and ability to enforce the Regulations. Third, the Title VI regulations leave significant discretion to the agency official to require compliance, which makes enforcement of the Title IX Regulations susceptible to the whims of each Presidential administration's political ideology. Fourth, courts would be better able and more likely to require the Department to enforce the Regulations if they were clear and unambiguous. Regulatory compliance procedures must include specific examples of how to address pregnancy discrimination to help regulators pinpoint how schools discriminate against pregnant students.

2. Solution—Clear Regulations Requiring the Department to Review Schools' Handling of Pregnant Students' Alternative School and Program Options.—The Regulations should incorporate specific compliance procedures that require regulators frequently to investigate mainstream and alternative schools for potential pregnancy discrimination. The Regulations should have language specifically calling for reviews of schools for pregnancy discrimination, including a suggested timetable and method for those reviews. First, schools that have had a history of mistreating pregnant teens should receive heightened review and be categorized as higher-risk schools in need of closer scrutiny. Those schools should be made aware that they are in the higher-risk category and should be given the reasons for that determination. The heightened review should be transparent on one hand, to allow those schools that are ignorant of their legal obligations to pregnant students to get into compliance; however, those schools should also receive more frequent random, surprise reviews.

Second, the procedures should explicitly mandate careful review of alternative programs for pregnant students. The risk that alternative programs fly

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204. *Id.*

205. William C. Rhoden, *She's Turning Pro, But Is It Progress?*, N.Y. TIMES, June 18, 2009, at B20 (recognizing Title IX as a "federal gender-equity law" in the context of athletics).

206. *See supra* Part II.B.1.

under the regulatory radar is real when pregnant students are so unlikely to report unlawful treatment, and they are the only students exposed to the programs. The Regulations should require an even higher level and frequency of review for alternative programs than they do for mainstream schools. The Department should be clear in the Regulations that all schools that receive federal funding will be subject to routine reviews of their policies and programs relating to pregnant teens.

D. Voluntary Attendance of "Comparable" Programs

The Regulations state that schools may offer alternative educational programs to pregnant teens as long as the programs are "comparable" to the mainstream education the students received before becoming pregnant and the choice to attend an alternative school is left to the pregnant student.[207] The Regulations make no other mention of the concept of alternative programs; there are no specific requirements to ensure the quality or quantity of education pregnant students must receive in the alternative programs. To date, there are no federal cases regarding the poor quality of education available to pregnant students.[208] This dearth of cases certainly does not imply that no problem exists, in light of compelling anecdotal evidence to the contrary and especially considering the weak procedural regulations governing enforcement and compliance.[209] Because the Regulations are silent as to what "comparable" means, schools can operate academically inferior schools without fear of reprisal.

1. Problem—Title IX Regulations Are too Weak to Address Schools' Efforts to Push Students to Alternative Programs and to Ensure that Alternative Schools Are Comparable.—The Regulations are too weak to protect pregnant students from being coerced into attending academically inferior alternative schools. Two problems with alternative education must be addressed with stronger Regulations. First, schools must understand that they may not coerce, or even encourage, girls to attend alternative schools, even if the schools are academically superior to mainstream schools.[210] Although the Regulations require that schools allow pregnant students to make the choice to attend pregnancy schools, they are apparently not clear enough to stop schools from

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207. 34 C.F.R. § 106.40(b)(3).

208. *See* PILLOW, *supra* note 27, at 62-63. The Author performed a Westlaw search for: "34 C.F.R. 106.40," which yielded no results post-2004, the year Pillow made the assertion that no cases regarding education quality issues arising under Title IX had been decided by the federal courts.

209. *See id.*; *see also supra* Part II.B.1. Pillow asserts that anecdotal evidence exists to indicate that some complaints of pregnancy discrimination are resolved at the school level, but that "complaints to the Office of Civil Rights remain low." PILLOW, *supra* note 27, at 62-63.

210. *See* Tamara S. Ling, Comment, *Lifting Voices: Towards Equal Education for Pregnant and Parenting Students in New York City*, 29 FORDHAM URB. L.J. 2387, 2405-07 (2002) (discussing the persistence of the practice in New York City of pushing pregnant students out of their original school to a pregnancy school).

shuttling pregnant girls out to alternative schools.[211] Second, the Regulations must clarify what "comparable" means in order to stop schools from ignoring pregnant students' academic needs and goals.[212] Clarifying the Regulations' meaning regarding the statement that pregnant students should be left to choose whether to attend alternative schools should help schools avoid unlawfully pushing students out of their mainstream school.

The Regulations state that a pregnant student's choice to attend an alternative school, should one exist, must be completely her own.[213] Despite that, anecdotal evidence shows that some schools still practice "push-out" with unabashed persistence.[214] The Regulations provide, in part, "A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is *completely voluntary on the part of the student*. . . ."[215] Although the simple language in the Regulations seems completely clear, it is apparently not enough.[216] The attitudes the Regulations were meant to combat, namely that pregnant students are a bad influence and must be banished, remain.[217] The Regulations must also be improved to combat another hold-over from pre-Title IX days—the academically inferior alternative school.

Although there are no federal cases to confirm the inadequacy of some pregnancy schools, there is anecdotal evidence of their inferiority.[218] In one alternative school, girls were learning to quilt as a means of learning geometry (they had to cut shapes out of fabric), and in another, fewer than fifty percent of the students attended every day.[219] Some alternative school facilities are old and inadequate, curricula are lacking, and expectations are too low to ensure that pregnant students in these schools continue to move forward with their studies.[220] Even though the Regulations require that alternative education is "comparable to that offered to non-pregnant students,"[221] the persistence of inferior alternative schools indicates a need for stronger Regulations to address the problem.

2. Solution—Regulatory Guidelines for Educators on How to Avoid Coercion and Clear Educational Standards for Alternative Schools.—The Regulations regarding alternative schools must clearly indicate that schools may not coerce pregnant students to attend alternative schools, and those alternative

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211. *See id.*

212. *See* Amber Hausenfluck, Comment, *A Pregnant Teenager's Right to Education in Texas*, 9 SCHOLAR 151, 175-79 (2006) (discussing the inadequacy of alternative schools in Texas); Ling, *supra* note 210, at 2400-04 (discussing the inadequacy of alternative schools in New York City).

213. *See* 34 C.F.R. § 106.40(b)(3) (2009).

214. *See* PILLOW, *supra* note 27, at 90-92.

215. 34 C.F.R. § 106.40(b)(3) (emphasis added).

216. *See id.*

217. *See* PILLOW, *supra* note 27, at 90-92.

218. *See* Hausenfluck, *supra* note 212, at 175-79; Ling, *supra* note 210, at 2400-04.

219. *See* Julie Bosman, *Schools for Pregnant Girls, Relic of 1960s New York, Will Close*, N.Y. TIMES, May 24, 2007, at A1.

220. *See id.*

221. 34 C.F.R. § 106.40(b)(3).

schools must meet certain academic standards. Regulators cannot trust that schools will allow pregnant students the choice to attend alternative programs because the decision-making process is so easy to influence. The Regulations should, therefore, include explicit language about the role schools can play in informing a pregnant student of her options. Also, the Regulations should include minimum educational requirements for alternative programs to ensure that pregnant students are actually receiving comparable educations to their non-pregnant peers. The rocky waters of advising students about what programs exist for pregnant students present the first area of improvement.

To further restrict any unlawful coercion of a pregnant student in her decision-making process, the Regulations should be changed in two ways. First, the Regulations should clarify that "completely voluntary on the part of the student"[222] means that schools should take no position on whether a pregnant student chooses to attend an alternative school. Second, the Regulations should include a new procedural provision that directs the Department to devise a set of guidelines for school administrators. The guidelines should help them understand the legal requirements associated with Title IX and its Regulations with respect to pregnancy, and how to approach discussions with pregnant students who are struggling with their educational choices. Both sets of provisions are necessary to protect pregnant students and to close the gap for schools that try to comply with the Regulations but do not know how to do so.

First, the Regulations, although seemingly clear, should be clarified further to remove any ambiguity about the appropriate level of input a school can have in a pregnant student's decision to attend an alternative school. The Regulations should state:

> A recipient may not, in any way, interfere with a student's decision to attend an alternative school. Interference includes, but is not limited to, encouragement to attend an alternative program by suggesting it would be superior to her current education, suggestion that her mainstream school might not be able to meet her needs during pregnancy, and telling her how many other students attend alternative programs (unless specifically asked).

Such specificity seems necessary in light of the continuing problems with pushing out pregnant students, but further clarification on how to speak to pregnant students is necessary and must be included in the Regulations.

Even in schools where administrators are not engaging in explicit "push out" efforts, there may be an implied message from the administration to the student that she should not plan on continuing with her education at the school she attended when she became pregnant during the pendency of her pregnancy. Just making information available about alternative programs, if not done carefully, can suggest to a pregnant student that she should not continue in her mainstream school. When a school district has an alternative educational environment available for pregnant students, it makes sense for the school district and its

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222. *Id.*

administrators to assume the alternative is a superior educational choice for the student. It really is not fair to leave administrators the difficult task of discussing alternative educational options without some guidance to help them avoid running afoul of Title IX. As such, the proposed procedures in the Regulations should direct the Department to draft guidelines to clearly explain how schools can discuss alternative schools with pregnant students without running afoul of the Regulations.

The procedures governing the Regulations should require the Department to write, distribute, and update as necessary, a set of guidelines for school administrators who discuss with students their academic options during pregnancy. The procedural Regulations should read:

> The responsible Department official, or his or her designee, should issue specific guidelines for distribution to all recipient schools with instruction about how to discuss with pregnant students their academic options during pregnancy. School districts that operate alternative schools should be specifically guided in how to avoid coercing pregnant students to attend those programs. The guidelines must be updated as necessary to apprise recipients of any changes in the law that would affect how they approach these discussions.

Not only should schools be clearly instructed about their responsibility to leave pregnant students to make their own decision regarding what school to attend, they must also be clear about what it means to offer a comparable education to that which is available in their mainstream school.

Although flexibility is crucial in the Title IX regulations for pregnant students, the requirement that they receive a "comparable" education is too vague to ensure that their education is actually comparable to what they would have received had they stayed in their mainstream school. Minimum graduation standards, with respect to math, science, English, and any other subjects required in the mainstream school system should also be required at alternative schools. School districts should operate under the assumption that pregnant students will continue to seek the same goals they would have sought if they were not pregnant. The value of extra-curricular options should not be discounted either. The one word in the Regulations addressing the quality of alternative schools—"comparable"[223]—is not enough to put schools on notice of their obligations to maintain academic standards in alternative schools.

It would not be difficult to elaborate on the current requirement in the Regulations with regard to alternative school quality. A simple requirement that schools be "comparable" leaves schools to interpret what academic and programmatic rigor is required of them, to the detriment of pregnant students. The Regulations should read:

> A recipient that operates an alternative school or program for pregnant students must adhere to the academic and programmatic requirements in

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223. *See id.*

> the school district's mainstream schools. While alternative schools may accommodate the particular physical and emotional needs presented during pregnancy, they may not vary from the educational quality or programmatic options available to students in mainstream schools.

Such a requirement should leave open the probability that schools will have to accommodate pregnant students' unique needs from time to time while clarifying schools' obligation to educate equally pregnant students.

CONCLUSION

The Regulations implementing and governing Title IX were intended to protect pregnant students from sex discrimination in school, but they are inadequate to address all of the unique challenges raised by pregnant students. The regulatory provisions governing pregnancy discrimination in schools have faded into the background, partially because their noisy neighbor, the provisions governing female participation in school athletics, have taken so much of the attention given to the Regulations. Despite numerous attempts by commentators to raise concerns about the continuing discrimination suffered by pregnant students, little has changed since the Regulations were enacted. In order to truly guarantee access, choice, and quality education to pregnant students, the Regulations must change. Stronger Regulations are the most likely vehicle to positive changes for pregnant students, which have been a long time coming and much needed to fulfill the promise of equality in Title IX.

In summary, the Regulations should be revised to include:

1) Language regarding reporting dropout rates:

> Recipients must isolate information about pregnant students, including dropout rates and reasons for dropping out. The information must be reported regularly, but no less than every three years, to the Secretary. Recipients must use the form issued by the Secretary to collect the required information.

2) Language regarding reporting of academic requirements:

> Recipients must also report to the Secretary on a regular basis, but no less than every three years, any difference in graduation or promotion requirements (such as permissible number of missed days, academic requirements, or physical education options and alternatives) between pregnant and non-pregnant students.

3) Language regarding reporting about alternative schools:

> Recipients who offer alternative schools to pregnant students must also report to the Secretary on a regular basis, but no less than every three years, how many pregnant students attend those alternative schools in a given year and how many students, who are known to the Recipient to be pregnant, remain in the school they attended before becoming pregnant.

4) Language regarding swift action in response to complaints of

discrimination:

> Upon receiving a complaint regarding pregnancy discrimination, the responsible Department official, or his or her designee, shall commence an emergency proceeding to determine whether the complaint has merit. The proceeding shall culminate in a preliminary injunction or temporary restraining order, where appropriate, to ensure that relief can be achieved as quickly as possible.

5) Language regarding how educators must leave the choice of attendance of an alternative school to the pregnant student:

> A recipient may not, in any way, interfere with a student's decision to attend an alternative school. Interference includes, but is not limited to, encouragement to attend an alternative program by suggesting it would be superior to her current education, suggestion that her mainstream school might not be able to meet her needs during pregnancy, and telling her how many other students attend alternative programs (unless specifically asked).

6) Language regarding procedural changes to require regulators to publish guidelines for school administrators:

> The responsible Department official, or his or her designee, should issue specific guidelines for distribution to all recipient schools with instruction about how to discuss with pregnant students their academic options during pregnancy. School districts that operate alternative schools should be specifically guided in how to avoid coercing pregnant students to attend those programs. The guidelines must be updated as necessary to apprise recipients of any changes in the law that would affect how they approach these discussions.

7) Language regarding a school's obligation to provide a comparable education to that which a non-pregnant student receives:

> A recipient that operates an alternative school or program for pregnant students must adhere to the academic and programmatic requirements in the school district's mainstream schools. While alternative schools may accommodate the particular physical and emotional needs presented during pregnancy, they may not vary from the educational quality or programmatic options available to students in mainstream schools.

EXCESSIVE REASONABLENESS

DIANA HASSEL*

ABSTRACT

This Article examines a crucial flaw in the qualified immunity doctrine and explains how it results in overprotection of defendants from liability. When qualified immunity is applied in a Fourth Amendment excessive force case, the defendant, typically a police officer, is protected from liability by two layers of reasonableness. First, qualified immunity absolves an individual government agent from liability under 42 U.S.C. § 1983, notwithstanding his violation of a constitutional right, if his actions were "objectively reasonable." Second, the agent is likewise absolved from liability under the Fourth Amendment itself if the amount of force used was "objectively reasonable." When these two doctrines converge, an almost impenetrable barrier to liability results. Although the Supreme Court has repeatedly tried to resolve conflicts inherent in the qualified immunity doctrine, most recently in *Pearson v. Callahan*, the excessive reasonableness in the qualified immunity regime, and the excessive force that is its practical consequence, remain.

INTRODUCTION

The qualified immunity doctrine arises as a defense to virtually every constitutional claim brought against an individual government actor under 42 U.S.C. § 1983 or its federal defendant analogue, *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[1] By dint of the defense, defendants are not liable unless their actions violate a clearly established right "of which a reasonable person would have known."[2] Defendants are entitled to qualified

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1. Section 1983 was first passed in 1871 and was known as the Ku Klux Klan Act. Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (1871) (current version at 42 U.S.C. § 1983 (2006)). It was enacted in response to violence against newly freed slaves that was uncontrolled by state governments; the Act was meant to provide a broad federal remedy against violations of civil rights by state government. *See* PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 47 (1983). In the absence of a similar remedy against civil rights violations by the federal government, the Supreme Court in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* created a broad remedy, similar to § 1983, for federal officials. 403 U.S. 388, 396-97 (1971).

2. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

immunity if their actions are objectively reasonable.[3] Since its inception, the doctrine has routinely perplexed and frustrated civil rights litigants, federal judges, and even the U.S. Supreme Court. The courts and litigants grappling with the complex qualified immunity defense seem to be following the dance steps required by the doctrine but without any music to give the dance meaning.

In January 2009, the Supreme Court, in *Pearson v. Callahan*,[4] once again attempted to bring some clarity to the qualified immunity regime. *Pearson* gives discretion to the lower courts in the sequence in which they address the issues raised by a qualified immunity defense to a constitutional claim.[5] Rather than requiring that lower courts first determine whether a constitutional right has been violated before moving on to qualified immunity, the courts are permitted to address whether the defendant is entitled to qualified immunity without ever reaching the constitutional issue.[6] This modification may give some relief to courts attempting to apply the qualified immunity defense, but it does not address fundamental problems at the heart of the qualified immunity doctrine. Meaningful improvements can only be made by examining the defense's basic underlying principles.

The Court's development of the qualified immunity doctrine has stretched the rationale underlying the defense to a breaking point. Instead of providing protection only to those government actors who violate the law unwittingly and reasonably, qualified immunity has metastasized into an almost absolute defense to all but the most outrageous conduct. The values of deterrence of unlawful behavior and compensation for civil rights victims have been overshadowed by the desire to protect government agents, particularly police officers, from almost all claims against them. The balance originally struck by the qualified immunity defense—protection for the innocent wrongdoer versus compensation for the victim—has gone awry.

This Article focuses on the most significant feature of the imbalance that now exists in the qualified immunity doctrine: the Court's insistence on applying the objective reasonableness standard of qualified immunity in conjunction with a duplicative underlying constitutional standard. This problem is most acute in excessive force claims. An apparent duplication of the objective reasonableness standard of the Fourth Amendment in excessive force cases and the same objective reasonableness standard in the qualified immunity doctrine has created a nearly impenetrable defense to excessive force claims. Despite critical scholarly commentary and the Supreme Court's own attempts to quiet the controversy created by this excessive reasonableness, the problem remains unresolved.[7]

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3. *Id.* at 818-19.

4. 129 S. Ct. 808 (2009).

5. *Id.* at 818. "[Lower courts] should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first . . . ."

6. *Id.* at 819-20.

7. In addition to the excessive reasonableness problem, an extensive body of critique has

Meanwhile, far removed from the debate over doctrinal niceties, the operational problem of how to address the use of unjustified force by police officers persists. The current legal regime has largely failed in its attempt to control excessive police violence.[8] At least in part that failure flows from the difficulty faced by claimants under § 1983 to overcome the insulation from liability that defendants derive from both the Fourth Amendment requirements and the qualified immunity standard. Until the nearly insurmountable barrier to recovery created by excessive reasonableness is somehow relieved, civil actions based on the Fourth Amendment will not effectively deter police violence.

Addressing the problem of police violence, providing balance to doctrine overly protective of defendants, and simplifying the procedural morass that qualified immunity has created in excessive force cases requires a radical modification of the doctrine. In excessive force cases, the doctrine should be modified to protect a defendant only when there has been a genuine change in the legal standard governing his actions—not merely an application of established doctrine to a somewhat new set of facts. Currently, qualified immunity prevents liability if the defendant's actions do not violate clearly established law "of which a reasonable person would have known."[9] Instead, the standard should be that the defendant will be liable unless his actions violate a newly developed legal standard. In the excessive force context, the protection provided by the reasonableness standard of Fourth Amendment, in conjunction with this more

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developed concerning the qualified immunity defense generally. *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 812 (1994) (questioning whether the defense should exist at all); Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229 (2006); Teressa E. Ravenell, *Hammering in Screws: Why the Court Should Look Beyond Summary Judgment When Resolving § 1983 Qualified Immunity Disputes*, 52 VILL. L. REV. 135, 185-86 (2007) (discussing whether the qualified immunity defense should be used to quickly resolve civil rights litigation); Henk J. Brands, Note, *Qualified Immunity and the Allocation of Decision-Making Functions Between Judge and Jury*, 90 COLUM. L. REV. 1045, 1057 (1990) (discussing what role judges and juries play in resolving qualified immunity issues); Michael S. Catlett, Note, *Clearly Not Established: Decisional Law and the Qualified Immunity Doctrine*, 47 ARIZ. L. REV. 1031 (2005) (discussing how to determine what rights are "clearly established").

8. *See* JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE (1993); Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2004); Jeremy R. Lacks, Note, *The Lone American Dictatorship: How Court Doctrine and Police Culture Limit Judicial Oversight of the Police Use of Deadly Force*, 64 N.Y.U. ANN. SURV. AM. L. 391 (2008). In particular, police violence has been seen to have a disproportionate effect on racial minorities. *E.g.*, Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL. L. REV. 1219 (2000); Andrea J. Ritchie & Joey L. Mogul, *In the Shadows of the War on Terror: Persistent Police Brutality and Abuse of People of Color in the United States*, 1 DEPAUL J. FOR SOC. JUST. 175, 177 (2008) (noting the conclusions of the United Nations Committee regarding police violence targeted at racial minorities); Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality,* 44 HASTINGS L.J. 753 (1993).

9. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

limited defense based on a newly developed law, will provide ample protection for the reasonably mistaken officer and will make compensation for the victim possible.

In Part I, this Article explains how the excessive reasonableness problem developed as Fourth Amendment doctrine and the qualified immunity doctrine were independently created and modified. Part II discusses repeated judicial attempts to avoid the difficulties presented by excessive reasonableness. Part III explores a modification of qualified immunity in the excessive force context limited to violations of newly developed legal standards.

I. QUALIFIED IMMUNITY AND EXCESSIVE FORCE CREATE EXCESSIVE REASONABLENESS

A. Excessive Force

In *Graham v. Connor*,[10] the Supreme Court resolved any doubt about the appropriate standard to be applied when assessing the constitutionality of the use of force during a stop or arrest. Determining that the requirements of the Fourth Amendment were the proper focus of an analysis of the use of excessive force during an arrest or stop, the Court announced that an "objective reasonableness" standard would apply.[11] The application of the "objective reasonableness" standard requires "a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake."[12] Factors such as the crime's severity, the immediacy of the threat to police or others, and whether the suspect is resisting arrest or attempting to flee, must be considered when analyzing reasonableness.[13] The test is an objective one that must make "allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving."[14] The Court emphasized that reasonableness "must be judged from the perspective of a reasonable officer on

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10. 490 U.S. 386 (1989). Prior to *Graham*, many courts applied a substantive due process standard to analyze excessive force cases. *Id.* at 392-93. The Court rejected the use of the same standard for all types of excessive force and instead mandated that a more specific constitutional standard, such as the Fourth or Eighth Amendments, be employed in analyzing allegations of excessive force. *Id.* at 394. *Graham* built on the Court's reasoning in *Tennessee v. Garner*, 471 U.S. 1, 7-22 (1985), in which the Court determined that the test for whether deadly force could be used in a seizure was based on an "objective reasonableness" standard. *Graham*, 490 U.S. at 392.

11. *Graham*, 490 U.S. at 388 ("This case requires us to decide what constitutional standard governs a free citizen's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other 'seizure' of his person. We hold that such claims are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard, rather that under a substantive due process standard.").

12. *Id.* at 396 (quoting *Garner*, 471 U.S. at 8).

13. *Id.*

14. *Id.* at 397.

the scene, rather than with the 20/20 vision of hindsight."[15]

In the thousands of excessive force cases that have followed *Graham*, courts have analyzed the question of what is objectively reasonable.[16] Most recently, in *Scott v. Harris*,[17] the Court emphasized that in determining whether the Fourth Amendment was violated there is no avoiding the necessity of "slosh[ing] our way through the factbound morass of 'reasonableness.'"[18] The cases analyzing the excessive force standard have arisen in a variety of factual scenarios, including: termination of high speed chases,[19] shootings,[20] use of restraints,[21] beatings,[22] and use of police dogs.[23] Actions based on excessive force are some of the most common civil rights claims and consume a large portion of federal courts' § 1983 docket.[24]

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15. *Id.* at 396.

16. *See, e.g.*, Chew v. Gates, 27 F.3d 1432, 1439 (9th Cir. 1994); Quezada v. County of Bernalillo, 944 F.2d 710, 716-17 (10th Cir. 1991). The question of whether the amount of force used was "objectively reasonable" is often submitted to the jury. *Id.* at 715 (citing Calamia v. City of New York, 879 F.2d 1025, 1035 (2d Cir. 1989).

17. 550 U.S. 372 (2007).

18. *Id.* at 383.

19. *Id.* at 374.

20. *E.g.*, McCormick v. City of Fort Lauderdale, 333 F.3d 1234, 1238 (11th Cir. 2003); Hemphill v. Schott, 141 F.3d 412, 414 (2d Cir. 1998).

21. *E.g.*, Muehler v. Mena, 544 U.S. 93, 95 (2005); Garrett v. Athens-Clarke County, 378 F.3d 1274, 1279 (11th Cir. 2004).

22. *E.g.*, Reese v. Herbert, 527 F.3d 1253, 1257-61 (11th Cir. 2008); Phelps v. Coy, 286 F.3d 295, 297 (6th Cir. 2002).

23. *E.g.*, Jarrett v. Town of Yarmouth, 331 F.3d 140 (1st Cir. 2003); Vathekan v. Prince George's County, 154 F.3d 173, 175 (4th Cir. 1998).

24. Richard P. Shafer, Annotation, *When Does Police Officer's Use of Force During Arrest Become So Excessive as to Constitute Violation of Constitutional Rights, Imposing Liability Under Federal Civil rights Act of 1871*, 60 A.L.R. Fed. 204 § 2(a) (1982); 21 AM. JUR. 3D *Proof of Facts* 685 (2009). Some argue that Fourth Amendment doctrine on the issue of excessive force is deeply flawed and results in unprincipled and indeterminate results. *See* Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1132-33 (2008). Harmon maintains that the Court has provided little guidance on how to determine how much police force is "reasonable" under the Fourth Amendment. *Id.* Having received little guidance, the lower courts "have recited *Graham* as if it were a mantra and then gone on to try to make sense of the facts of individual cases using intuitions about what is reasonable for officers to do." *Id.* at 1132. For example, some Circuits have required that a plaintiff suffer an actual physical injury in order to successfully bring an excessive force claim. Bryan N. Georgiady, Note, *An Excessively Painful Encounter: The Reasonableness of Pain and De Minimis Injuries for Fourth Amendment Excessive Force Claims*, 59 SYRACUSE L. REV. 123, 137-38 (2008); *see also* Kathryn R. Urbonya, *Dangerous Misperceptions: Protecting Police Officers, Society, and the Fourth Amendment Right to Personal Security*, *in* SWORD & SHIELD REVISITED: A PRACTICAL APPROACH TO SECTION 1983, at 259 (Mary Massaron Ross ed., 1998).

In a typical case, such as *Jennings v. Pare*,[25] the plaintiff alleges that the force used in restraining him during an arrest was excessive. In *Jennings*, state police officers entered a smoke shop run by the Narragansett Indian Tribe and were attempting to search it when the plaintiff, one of the employees of the shop, objected to the search and began struggling with the police as they tried to handcuff him.[26] In the course of the struggle one of the officers, the defendant in the action, grabbed the plaintiff's ankle and twisted it—the plaintiff's ankle was broken in the process.[27] The plaintiff claimed that the defendant kept twisting even after the plaintiff stopped resisting.[28] The defendant claimed that he was properly executing an "ankle turn control technique" to restrain the plaintiff.[29]

In analyzing whether the defendant's behavior violated the Fourth Amendment, the court reviewed, in detail, all the conflicting factual evidence about the actions of the plaintiff and the actions of the police before, during, and after the struggle.[30] Focusing on the conflicting testimony regarding whether the plaintiff kept resisting after the "ankle turn control technique" was administered, the court concluded that "[the plaintiff] failed to present any evidence that, under the circumstances confronting [the defendant], 'no objectively reasonable officer' would have applied the ankle turn control technique in the manner that [the defendant] did."[31] In determining that there had been no Fourth Amendment violation, the court emphasized that police officers must act "'in circumstances that are tense, uncertain, and rapidly evolving,' and that their conduct 'must be judged from the perspective of a reasonable officer on the scene.'"[32]

Thus, in applying the *Graham* objective reasonableness standard, the benefit of the doubt goes to the defendant police officer. If there is any way his actions could have been believed to be a reasonable response to the situation, as perceived by the officer at the time, the Fourth Amendment is not violated.

B. Qualified Immunity

Meanwhile, the Court was refining the standard for qualified immunity. Qualified immunity was initially understood to be similar to the good faith

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25. No. 03-572-T, 2005 WL 2043945, (D.R.I. Aug. 24, 2005), *vacated sub nom.*, Jennings v. Jones, 479 F.3d 110 (1st Cir. 2007).

26. *Id.* at *1-2.

27. *Id.* at *2.

28. *Id.*

29. *Id.*

30. *Id.* at *6. The jury found that the defendant's actions constituted excessive force but the court determined that the issue should not have been submitted to the jury and granted a motion for judgment as a matter of law for the defendant. *Id.* at *1, *13-14. That motion was later vacated by the First Circuit Court of Appeals. Jennings v. Jones, 479 F.3d 110, 112 (1st Cir. 2007).

31. *Jennings*, 2005 WL 2043945 at *7.

32. *Id.* at *6 (quoting Graham v. Connor, 490 U.S. 386, 396-97 (1989)).

defense available under common law in 1871 when § 1983 was adopted.[33] The common law immunity foreclosed liability when a government officer acted with good faith and probable cause in making an arrest.[34] The Court was particularly concerned with the unfairness of imposing liability on a government official based on newly developed law: police officers should "not [be] charged with predicting the future course of constitutional law."[35] In time, the qualified immunity defense was expanded beyond law enforcement officials to cover virtually any kind of government actor.[36] So long as the officer reasonably and with good faith believed that he was acting within constitutional limits, immunity would be granted.

Because the qualified immunity defense contained a subjective element—that the officer acted in good faith—factual disputes with respect to the officer's state of mind could easily defeat a summary judgment motion on the issue of qualified immunity. Because few qualified immunity defenses could be resolved prior to trial, government officials might well be involved in lengthy, but essentially meritless, litigation. This concern led the Court in *Harlow v. Fitzgerald*,[37] to eliminate the subjective component of qualified immunity.[38] The newly articulated qualified immunity test provided that "government officials . . . generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[39] The Court hoped that the elimination of the subjective good faith portion of the standard would make it possible to dismiss frivolous suits at the summary judgment stage.[40] No longer would a plaintiff be able to prolong a civil rights suit by alleging that the defendant acted in bad faith.[41] The objective qualified immunity standard was seen to represent

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33. *See* Pierson v. Ray, 386 U.S. 547, 550-51 (1967).

34. *Id.* at 555. In *Pierson*, police officers arrested the plaintiffs under a statute that was later held to be unconstitutional. *Id.* at 550. The Court reasoned that it would be unfair to hold the police officers liable "for acting under a statute that [they] reasonably believed to be valid but that was later held unconstitutional." *Id.* at 555.

35. *Id.* at 557.

36. *See* Wood v. Strickland, 420 U.S. 308, 322 (1975) (expanding qualified immunity to cover school board officials); Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974) (expanding qualified immunity to cover all executive branch officers). Some government officials, judges, legislators, prosecutors, and the president, are entitled to absolute immunity. *See* Nixon v. Fitzgerald, 457 U.S. 731, 757 (1982) (president entitled to absolute immunity); Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976) (prosecutors protected by absolute immunity); Pierson v Ray, 386 U.S. 547, 553-54 (1967) (judges covered by absolute immunity); Tenney v. Brandhove, 341 U.S. 367, 379 (1951) (legislators absolutely immune).

37. 457 U.S. 800 (1982).

38. *Id.* at 816-18.

39. *Id.* at 817-18.

40. *Id.*

41. *See id.* In addition, defendants in civil rights suits have the right to an immediate interlocutory appeal of a denial of qualified immunity. Mitchell v. Forsyth, 472 U.S. 511, 530

the proper balance between conflicting interests: the interest in providing compensation for, and deterring unconstitutional conduct against the need to protect against frivolous lawsuits and to encourage vigorous enforcement of the law.[42]

Evaluation of a qualified immunity defense requires courts to determine whether the acts alleged by the plaintiff constitute a violation of a federal right and, if so, to determine whether that violation has been sufficiently established so that a reasonable official would know his acts violate the law. For example, in *Jennings*, the excessive force case discussed earlier,[43] the court determined that even if the police officer's actions had violated the Fourth Amendment, he was nonetheless entitled to qualified immunity.[44] The court first determined that the unlawfulness of using an "ankle turn control technique" in the circumstances confronted by the officer, had not been clearly established by prior case law.[45] The court then determined that even if the law had been clearly established, the defendant was still entitled to qualified immunity because any misapprehension of the law or the factual circumstances he might have had would be reasonable given the ambiguity of the situation with which he was confronted.[46]

As articulated by *Harlow* and as subsequently interpreted by the courts, qualified immunity has provided a broad and generally successful defense to most civil rights claims.[47] As the Court has explained, qualified immunity ensures that only "the plainly incompetent or those who knowingly violate the law" will be found liable under § 1983.[48] Qualified immunity has moved closer to a system of absolute immunity for most defendants, resulting in a finding of liability for only the most extreme and most shocking misuses of police power.

C. Application of the Two Standards

Operating on two different fronts, the Court, by the late 1980s, had created two almost identical objective reasonableness tests: One governed excessive force under the Fourth Amendment and the other governed qualified immunity. Difficulty arose, however, when these two standards were called into play at the

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(1985).

42. *See* Diana Hassel, *Living A Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 131 (1999).

43. *See supra* text accompanying notes 25-32.

44. Jennings v. Pare, No. 03-572-T, 2005 WL 2043945, at *13 (D.R.I. Aug. 24, 2005), *vacated sub nom.* Jennings v. Jones, 479 F.3d 110 (1st Cir. 2007).

45. *Id.* at *10.

46. *Id.* at *11.

47. *See* SWORD AND SHIELD: A PRACTICAL APPROACH TO SECTION 1983 LITIGATION 46-53 (Mary Massaron Ross & Edwin P. Voss, Jr. eds., 3rd ed. 2006). Claims involving prisoner rights and actions against police officers appear to be particularly unlikely to succeed. Melissa L. Koehn, *The New American Caste System: The Supreme Court and Discrimination Among Civil Rights Plaintiffs*, 32 U. MICH. J.L. REFORM 49, 103 (1998).

48. Malley v. Briggs, 475 U.S. 335, 341 (1986).

same time in considering the liability of a defendant in a civil rights action. When these two standards are both operating, a court must first determine whether a defendant's actions are objectively reasonable. Then, assuming that the actions were not objectively reasonable, the court must determine whether it was nonetheless objectively reasonable for the defendant to have believed his actions were objectively reasonable. The application of this nonsensical series of questions leads to skewed results. Most problematically the two doctrines lead to two levels of protection for a defendant. Additionally, courts must jump through convoluted analytical hoops that result in unclear and needlessly complicated decisions.

The problem of having two reasonableness standards could come into play in any Fourth Amendment claim, but the difficulty is most acute in an action concerning excessive force. Although other Fourth Amendment questions, such as the legality of searches or the legality of arrests, are also ultimately based on reasonableness, the standards governing such actions are much more concrete and specific than those governing excessive force.[49] The excessive force standard, as articulated by *Graham* is just a generalized reasonableness test—thus, the closest parallel to the qualified immunity doctrine.

Following the convergence of the qualified immunity doctrine and the excessive force standards, the courts of appeals attempted to apply the odd doctrinal regime. Although some courts attempted to comply with the message from the Court in *Anderson v. Creighton*,[50] that the Fourth Amendment inquiry was separate from the qualified immunity question even in an excessive force case, others found such an application impossible.[51] For example, in *Roy v. City of Lewiston*,[52] the First Circuit Court of Appeals grappled with the qualified

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49. Concern with the convergence of reasonableness standards has arisen in Fourth Amendment contexts other than excessive force. This aggregation of reasonableness was commented on by Justice Stevens in his dissent in *Anderson v. Creighton*, where he criticized the "two layers of insulation from liability" that result in the application of the qualified immunity defense to a Fourth Amendment claim. 483 U.S. 635, 659 (1987) (Stevens, J., dissenting). *Anderson* concerned the application of the qualified immunity defense to a Fourth Amendment claim based on a warrantless search by the FBI. *Id.* at 637. Justice Stevens argued that the underlying Fourth Amendment standard provided ample protection for the reasonably mistaken law enforcement official and that by adding another reasonableness standard to the mix, "the Court counts the law enforcement interest twice and the individual's . . . interest only once." *Id.* at 664 (Stevens, J., dissenting) (footnote omitted); *see also* Lisa R. Eskow & Kevin W. Cole, *The Unqualified Paradoxes of Qualified Immunity: Reasonably Mistaken Beliefs, Reasonably Unreasonable Conduct, and the Specter of Subjective Intent that Haunts Objective Legal Reasonableness*, 50 BAYLOR L. REV. 869 (1998).

50. 483 U.S. 635 (1987).

51. *E.g.*, Scott v. Henrich, 39 F.3d 912, 914 (9th Cir. 1994) (finding no distinction between qualified immunity inquiry and inquiry on the merits in excessive force case); Brown v. Glossip, 878 F.2d 871, 873 (5th Cir. 1989) (discerning "no principled distinction between availability of qualified immunity" in unreasonable search case and qualified immunity in excessive force case).

52. 42 F.3d 691 (1st Cir. 1994).

immunity defense in a case alleging excessive force in the course of an arrest.[53] Determining that the substantive liability issue and the qualified immunity issue were the same, the court expressed doubt that, in an excessive force case, the issue of the Fourth Amendment violation could have a different outcome from the qualified immunity question.[54] In another attempt to work with the qualified immunity doctrine, the Second Circuit Court of Appeals in *Finnegan v. Fountain*,[55] separated the two different prongs of qualified immunity.[56] The aspect of the qualified immunity defense that precludes liability when the conduct of the defendant does not violate clearly established rights was available in an excessive force claim.[57] But the second prong of the qualified immunity defense, which asks whether the defendant's belief that his actions were lawful was objectively reasonable, would already have been answered in a determination that the actions violated the Fourth Amendment.[58] In the end, the Tenth, Ninth, Seventh, Sixth, and D.C. Circuit Courts of Appeals abandoned the attempt to follow *Anderson*'s guidance and held that the two questions—use of excessive force and qualified immunity—merged into one inquiry.[59]

Academic commentators also questioned the workability or the necessity of the simultaneous application of the qualified immunity and the excessive force standards.[60] Kathryn Urbonya argued that the qualified immunity standard defense is unnecessary in excessive force claims because the substantive standards already includes the protection inherent in a reasonableness standard.[61] Urbonya and others maintained that once the Fourth Amendment issue is resolved, the qualified immunity issue has also been resolved, and to treat the

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53. *Id.* at 693.

54. *Id.* at 695. "In theory, substantive liability and qualified immunity are two separate questions and, indeed, may be subject to somewhat different procedural treatment. In police misconduct cases, however, the Supreme Court has used the same 'objectively reasonable' standard in describing both the constitutional test of liability, and the Court's own standard for qualified immunity. It seems unlikely that this case would deserve a different outcome even if the qualified immunity defense had not been raised." *Id.* (citations omitted).

55. 915 F.2d 817 (2d Cir. 1990).

56. *Id.* at 822-23.

57. *Id.* at 823.

58. *Id.*

59. *See, e.g.*, Katz v. United States, 194 F.3d 962, 968 (9th Cir. 1999), *rev'd sub nom.* Saucier v. Katz, 533 U.S. 194 (2001); Frazell v. Flanigan 102 F.3d 877, 886 (7th Cir. 1996); Scott v. District of Columbia, 101 F.3d 748, 759 (D.C. Cir. 1996); Street v. Parham, 929 F.2d 537, 540 (10th Cir. 1991); Holt v. Artis, 843 F.2d 242, 245-46 (6th Cir. 1988).

60. *E.g.*, Eskow & Cole, *supra* note 49, at 878-79; Kathryn R. Urbonya, *Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force*, 62 TEMP. L. REV. 61 (1989); Stephen Yagman, *Excessive Force—What Is It Good for? Absolutely Nothing, Juries are Supposed to Decide Whether Force Is Excessive, and, When They Do, There Is No Qualified Immunity*, 568 PRACT. L. INST. 735 (1997). *But see* Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 659 (1998).

61. Urbonya, *supra* note 60, at 108.

two separately would unfairly benefit the defendant.[62]

The two standards also created difficulties in allocating resolution of factual and of legal issues between the judge and the jury. Determining whether a particular set of actions is reasonable under the Fourth Amendment will often present factual questions that normally are submitted to a jury. In contrast, qualified immunity is characterized as a legal question to be resolved by the judge.[63] Because the two questions—Fourth Amendment and qualified immunity—require resolution of the same reasonableness issues, courts struggled to determine how to divide the task between the judge and the jury.[64] Some even argued that once a jury finds that a defendant's acts were determined to be an unreasonable use of force under the Fourth Amendment, it was a usurpation of the jury's role for the judge to, in effect, undo that determination by concluding that the actions were reasonable under the qualified immunity standard.[65]

Application of the qualified immunity defense is less difficult when the underlying constitutional standard is not one of objective reasonableness. For example, in civil rights actions based on a violation of a public employee's First Amendment rights, the court first determines if the employee's actions were protected by the First Amendment.[66] For public employee speech, the relevant questions include whether the employee was speaking on a matter of public concern, whether the employee was speaking as an employee or as a citizen, and how disruptive the speech was to the workplace function.[67] If the court finds that the facts alleged by the plaintiff support a finding of a violation of the First Amendment, the court must then determine if the law on the issue was clearly established, and whether a reasonable official would have been aware of that constitutional right.[68] The last step ensures that the court does "not impose on the official a duty to sort out conflicting decisions or to resolve subtle or open issues."[69]

For example, in *Lindsey v. Orrick*, the Eighth Circuit Court of Appeals

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62. Urbonya, *supra* note 60, at 105-09; Armacost, *supra* note 60, at 661.

63. Hunter v. Bryant, 502 U.S. 224, 228 (1991).

64. *See* Tatro v. Kervin, 41 F.3d 9, 15 (1st Cir. 1994); Finnegan v. Fountain, 915 F.2d 817, 821 (2d Cir. 1990) (explaining that it was error to submit the issue of qualified immunity to the jury because the application of qualified immunity is for the court to decide); Hall v. Ochs, 817 F.2d 920, 924 (1st Cir. 1987) (explaining that the objective reasonableness assessment for qualified immunity is for the judge to make, not the jury).

65. Yagman, *supra* note 60, at 737 ("In [excessive] force cases . . . juries decide if too much force was used, and when they do, there is no qualified immunity defense. A finding of excessive force makes a finding of qualified immunity factually and legally impossible, and a finding of reasonable force renders the issue of qualified immunity moot.").

66. Lindsey v. City of Orrick, 491 F.3d 892, 897 (8th Cir. 2007).

67. *See* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006); Charles v. Grief, 522 F.3d 508, 512 (5th Cir. 2008); Campbell v. Galloway, 483 F.3d 258, 266 (4th Cir. 2007) (citing *Garcetti*, 547 U.S. at 421); *Lindsey*, 491 F.3d at 897.

68. *Campbell*, 483 F.3d at 271-72.

69. *Id.* at 271 (citing to McVey v. Stacy, 157 F.3d 271, 277 (4th Cir. 1998)).

affirmed a lower court's denial of the defendant's motion for summary judgment because the facts alleged by the plaintiff established that her speech was protected and that a reasonable official would have realized that firing her because of the speech was unconstitutional.[70] The plaintiff's speech—raising concerns about the city's compliance with open meetings law—was protected because it was made as a citizen, not an employee, it was on a matter of public concern, and there were insufficient allegations that the employee's speech was disruptive to the workplace.[71] Having determined that the plaintiff's allegations supported a violation of her First Amendment rights, the court then addressed the question whether "[the] right was clearly established such that a reasonable official would have known [the firing] was unlawful."[72] Only at this point was the reasonableness of the defendant's behavior evaluated. The court in *Lindsey* rejected the defendant's assertions of a reasonable mistake, finding that the law in the area was too well established and the protected nature of the speech was too obvious for the defendant's behavior in terminating the plaintiff to be objectively reasonable.[73]

Although the questions relating to First Amendment doctrine and the limits of the constitutional protection of public employee speech may be complex, the doctrine does not include a cushion for reasonable mistakes made by a government official. Any wiggle room for the official only comes into play when the qualified immunity test is applied. The substantive First Amendment standard does not allow for reasonable, even if mistaken, actions. Only when the qualified immunity defense is asserted does the wiggle room provided by reasonableness come into play. By contrast, in an excessive force case, the court must first determine whether the amount of force used was reasonable given the circumstances faced by the officer and then determine whether it was reasonable for the officer to believe that the amount of force used was constitutional.

II. THE SUPREME COURT'S FLAWED SOLUTIONS

As voices of discontent with the two standards grew in the lower courts and among legal scholars, the Court attempted to quiet the waters with a firm reiteration of basic principles.

A. Saucier v. Katz

In 2001, the problem presented by the two reasonableness standards made its way to the U.S. Supreme Court in *Saucier v. Katz*.[74] This case grew out of the arrest of a demonstrator at a speech given by Vice President Al Gore at a U.S. Army base in California.[75] The plaintiff, an animal rights activist, began to

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70. *Lindsey*, 491 F.3d at 902.

71. *Id.* at 901.

72. *Id.*

73. *Id.* at 901-02.

74. 533 U.S. 194 (2001).

75. Katz v. United States, 194 F.3d 962, 965 (9th Cir. 1999), *rev'd sub nom.* Saucier v. Katz,

unfurl a banner during Gore's speech concerning the treatment of animals.[76] He was forcibly removed and placed in a van by military police officers.[77] He was detained briefly and then released.[78] The plaintiff alleged, among other things, that the force used during his seizure was excessive.[79] Because of factual disputes concerning both the amount of force used and whether the plaintiff resisted the actions of the police, the district court denied the defendant's motion for summary judgment on the excessive force claim.[80] The court stated that because there was a factual dispute on the substance of the Fourth Amendment claim, there could be no resolution of the qualified immunity issue: "the qualified immunity inquiry is the same as the inquiry on the merits in an excessive force claim."[81]

The Ninth Circuit Court of Appeals, consistent with many circuits, held that "'the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is the same as the inquiry on the merits of the excessive force claim.'"[82] Therefore a factual dispute with respect to the merits of an excessive force claim would preclude the resolution of summary judgment of the qualified immunity defense. The court distinguished those situations where the qualified immunity defense was based not on the objective reasonableness of the officer's belief in the lawfulness of his action, but on the fact that the law was not clearly established.[83] Factual disputes would not prevent a court from granting summary judgment for the defendant if the actions alleged by the plaintiff did not violate clearly established law.[84]

In support of the court of appeals's decision, briefs submitted to the Supreme Court argued that the qualified immunity issue and the excessive force issue merge into a single analytical question and that the *Graham* standard already gave an officer substantial latitude in the amount of force that could be used.[85] The reconsideration of the same factor twice would give the defendant an unfair advantage in excessive force cases and would, in effect, increase the plaintiff's burden of proof.[86] At the oral argument the respondents urged that the *Graham*

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533 U.S. 194 (2001).

76. *Id.*

77. *Id.*

78. *Id.* at 965-66.

79. *Id.* at 966.

80. *Id.*

81. *Id.*

82. *Id.* at 968 (citing Alexander v. County of Los Angeles, 64 F.3d 1315, 1322 (9th Cir. 1995)).

83. *Id.* at 970.

84. *Id.*

85. *See, e.g.*, Brief for Amicus Curiae Ass'n of the Bar of the City of N.Y. in Support of Respondents at 13, Saucier v. Katz, 533 U.S. 194 (2001) (No. 99-1977), 2001 WL 173525; Brief Amicus Curiae of the ACLU et al. at 8, in Support of Respondents, Saucier v. Katz, 533 U.S. 194 (2001) (No. 99-1977), 2001 WL 173522.

86. Brief Amicus Curiae of the ACLU et al., in Support of Respondents at 18, *supra* note 85.

standard provides adequate protection for reasonable mistakes made by government officials and that it "gives a buffer for the trial court judge to get rid of an insubstantial case."[87]

The Supreme Court reversed the court of appeals in *Saucier* and held that, contrary to what many of the circuits had determined, "the ruling on qualified immunity requires an analysis not susceptible of fusion with the question whether unreasonable force was used in making the arrest."[88] The Court explained that the standard articulated in *Graham* with respect to reasonableness is different from the reasonableness inquiry required by qualified immunity.[89] Specifically, the Fourth Amendment asks the question whether the officer reasonably believed that amount of force used was necessary.[90] Even if that reasonable assessment was a mistake, the officer did not violate the Fourth Amendment.[91] The qualified immunity defense asks the further question whether the officer made a mistake with respect to "the legal constraints on particular police conduct."[92] Qualified immunity is appropriate when the officer correctly perceives "all of the relevant facts but [has] a mistaken understanding as to whether a particular amount of force is legal in those circumstances."[93]

In applying these standards, the Court instructed the lower courts to first determine if the Fourth Amendment right against excessive force was violated and then separately determine whether the defendant is entitled to qualified immunity.[94] On a summary judgment motion, the court should determine if the facts viewed most favorably to the plaintiff show that the *Graham* standard was violated.[95] If there is a constitutional violation, the court should then determine if it has been clearly established that the amount of force used in these circumstances is excessive.[96] Qualified immunity will protect the defendant

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87. Transcript of Oral Argument at 28, *Saucier*, 533 U.S. 194 (No. 99-1977). Arguing on behalf of the petitioner, the Deputy Solicitor General maintained that the Fourth Amendment and qualified immunity standards should be kept separate. *Id.* at 4. The Deputy Solicitor General explained the difference between the two standards as the "[Fourth Amendment] looks at the force used and asks whether that force was reasonable," whereas the qualified immunity test "takes a broader look at what the preexisting law was and asks whether the officer was on notice that his conduct . . . violated clearly-established law." *Id.* at 4, 13.

88. Saucier v. Katz, 533 U.S. 194, 197 (2001). Justice Kennedy wrote the opinion of the Court and was joined by Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Thomas and in part by Justice Souter. Justices Souter and Ginsburg wrote a concurring opinion in which Justices Stevens and Breyer joined and Justice Souter filed an opinion concurring in part and dissenting in part. *Id.* at 196.

89. *Id.* at 203-04.

90. *Id.* at 201-02.

91. *Id.* at 205.

92. *Id.*

93. *Id.*

94. *Id.* at 202.

95. *Id.* at 201-02.

96. *Id.* at 202.

when his actions fall on the "'hazy border between excessive and acceptable force.'"[97] On a concrete level, the questions for the court are whether the amount of force used is reasonable given the *Graham* factors: severity of the crime, whether the suspect posed an immediate threat, and whether the suspect was actively resisting arrest.[98] That assessment must be made with "careful attention to the facts and circumstances of each particular case."[99] Assuming the court can resolve that issue, it must then ask if it was reasonable for the defendant to believe that his actions did not violate the standard articulated in *Graham* and its progeny. If there is a controlling case exactly on point, qualified immunity should be denied. If, as is more likely, the particular factual situation presented by the case has not been previously litigated, the court must ask whether there is specific enough notice from *Graham* and other case law to put the defendant on notice that his actions were unconstitutional.[100]

A separate analysis of the Fourth Amendment violation and qualified immunity also served the purpose of clarifying constitutional standards. The resolution of the constitutional standard may well become the basis for a determination in a future case that the law is clearly established.[101] The Court's belief that a separate analysis of the constitutional claim would enhance the development of the law served as one of the rationales for the *Saucier* holding.[102]

The flaw in the Court's instructions in *Saucier* is that the second reasonableness inquiry required by *Saucier*—given the state of the law, whether it was reasonable for a defendant to believe the amount of force he used was lawful—is hard to distinguish from the first reasonableness inquiry under *Graham*. For both questions, the answer turns on the threat as perceived by the officer, including the dangerousness of the plaintiff to the officer and to the public. The same factors that determine whether a particular use of force is reasonable under *Graham* will also determine whether the actions could reasonably be considered unlawful. The mere assertion that the two reasonable standards are different does not make them so.

In her concurring opinion, Justice Ginsburg, argued that the methodology laid out by the Court to resolve qualified immunity in an excessive force case was too complicated.[103] Justice Ginsburg concluded that, "[t]he two-part test today's decision imposes holds large potential to confuse."[104] In the end, the analysis of whether there has been excessive force and whether the defendant is entitled to qualified immunity is the same: "Taking into account the particular circumstances confronting the defendant officer, could a reasonable officer,

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97. *Id.* at 206 (citing Priester v. Riviera Beach, 208 F.3d 919, 926-27 (11th Cir. 2000)).
98. *Id.* at 205 (citing Graham v. Connor, 490 U.S. 386, 396 (1989)).
99. *Graham*, 490 U.S. at 396.
100. *Saucier*, 533 U.S. at 202.
101. *Id.* at 201.
102. *See id.*
103. *Id.* at 210 (Ginsburg, J., concurring).
104. *Id.*

identically situated, have believed the force employed was lawful?"[105] Justice Ginsburg rejected the inherent duplication in the Court's two part inquiry regarding excessive force and qualified immunity, and argued that "[o]nce it has been determined that an officer violated the Fourth Amendment by using 'objectively unreasonable' force as that term is explained in *Graham v. Connor*, there is simply no work for a qualified immunity inquiry to do."[106]

Saucier rejected the reasoning of several courts of appeals and many commentators by insisting that the qualified immunity defense would be handled in excessive force cases just as it was in other civil rights claims.[107] There were likely several forces at work causing the Court to insist on this almost certainly unworkable regime. Among those motivations may have been a desire for consistency and an adherence to *Harlow*; a reluctance to diminish the protection from liability in excessive force cases; a desire to keep qualified immunity firmly in the hands of the judge not a jury; and a desire to encourage resolution of qualified immunity issues in the early stages of litigation.

Harlow set forth a general "objective reasonableness" standard for qualified immunity to be applied regardless of the underlying constitutional claim.[108] To allow a variation of that standard in excessive force cases might start to unravel other, often criticized, aspects of the qualified immunity doctrine.[109] The prospect of evaluating the appropriateness of the qualified immunity standard in conjunction with doctrine relating to a wide range of constitutional rights may have seemed to the Court to be a step toward an even more complicated civil rights regime.

The *Saucier* decision also reflects the increasingly protective nature of qualified immunity and the Court's transformation of the defense into a kind of absolute immunity. Since its early adoption as a common law "good faith and probable cause" defense, qualified immunity has grown steadily more favorable for defendants: it was transformed into an objective test to protect defendants from lengthy litigation; resolution of qualified immunity prior to allowing the plaintiff any significant discovery is favored; and interlocutory appeals are allowed so that a defendant need not wait until the end of trial to appeal a denial of qualified immunity.[110] It has come to be viewed not merely as a defense against liability, but also an "immunity from suit" similar to absolute immunity.[111] Protection of government agents from civil rights claims is seen as

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105. *Id.*

106. *Id.* at 216-17.

107. *See supra* notes 47-64 and accompanying text.

108. Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982).

109. *See, e.g.*, Armacost, *supra* note 60, at 584-85 (discussing inconsistency of emphasis on individual fault inherent in qualified immunity defense and reality of indemnification); Chen, *supra* note 7, at 229-30 (arguing that qualified immunity doctrine is inconsistent in its insistence on early termination of suits while failing to acknowledge the critical role fact finding must play in resolving an assertion of a qualified immunity defense).

110. *See* Chen, *supra* note 7, at 233-41.

111. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

particularly appropriate when the accusations stem from a violent confrontation between a law enforcement official and an apparent law breaker.[112]

The reluctance to collapse the excessive force and qualified immunity issues also stems from a desire to keep the immunity question out of the hands of the jury.[113] Although the substantive issue of whether the Fourth Amendment was violated may be appropriate for a jury, in the Court's view, the question of whether a defendant is entitled to qualified immunity is not.[114] By insisting that the Fourth Amendment analysis be kept separate from the qualified immunity analysis, the *Saucier* rule ensures that the role of the jury in the resolution of qualified immunity be kept to a minimum. The Rehnquist Court's qualified immunity doctrine may also reflect a more general distrust of juries and hostility to the trial process itself.[115] Andrew Siegel has concluded that the Court's approach to qualified immunity is part of a larger attempt to limit litigation,[116] that is to remove the resolution of civil disputes from trial courts by limiting the suits that can be brought,[117] limiting the damages that can be awarded,[118] and by requiring claims to be resolved through arbitration or other private dispute resolution mechanisms.[119] Qualified immunity doctrine illustrates this hostility to litigation by broadly eliminating liability for constitutional wrongs. At bottom, Siegel believes that the Court in recent years has exhibited "doubt in the efficacy of a lawsuit as a mechanism for resolving the problem at hand, coupled perhaps with a disproportionate animosity towards those who believe otherwise."[120]

Regardless of the forces that led to the decision, following *Saucier*, the courts of appeals dutifully attempted to apply the two-part standard in excessive force cases.[121] Attempting to separate the excessive force analysis from the qualified immunity analysis, however, proved difficult.[122] In many cases, of course, the

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112. Koehn, *supra* note 47, at 51. Koehn maintains that suits against police officers are among the least likely to result in successful outcomes for plaintiffs. *Id.* at 50-51; *see* Hassel, *supra* note 42, at 146.

113. Chen, *supra* note 7, at 262-63.

114. Karen Blum, *Qualified Immunity in the Fourth Amendment: A Practical Application of §1983 As It Applies to Fourth Amendment Excessive Force Cases*, 21 TOURO L. REV. 571, 594-95 (2005) (explaining that while the issue of whether there has been excessive force under the Fourth Amendment should be decided by the jury, the question of qualified immunity must be decided by the court. If the two issues are 'intertwined' with unresolved factual issues, special interrogatories should be submitted to the jury.).

115. Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1130-32 (2006).

116. *Id.* at 1132.

117. *Id.* at 1133-34.

118. *Id.* at 1136-37.

119. *Id.* at 1140-41.

120. *Id.* at 1115.

121. *See infra* notes 122-23.

122. Interestingly, while *Saucier* has led to more courts delineating the contours of

courts found that there was no violation of the Fourth Amendment and thus determined that the qualified immunity issue need not be reached.[123]

Frequently, however, courts painstakingly concluded that a Fourth Amendment violation had occurred and that, almost inevitably, the defendant was not entitled to qualified immunity. For example, in *Jennings v. Jones*,[124] the First Circuit Court of Appeals set forth the inquiry required by *Saucier*:

> (1) whether the claimant has alleged the deprivation of an actual constitutional right; (2) whether the right was clearly established at the time of the alleged action or inaction; and (3) if both these questions are answered in the affirmative, whether an objectively reasonable official would have believed that the action taken violated that clearly established constitutional right.[125]

Having determined that a violation of a clearly established right occurred, the court then asked the last question—whether the objectively reasonably officer would have realized he was violating a constitutional right and admits candidly, "[a]t first glance, this inquiry appears indistinguishable from that in the first prong."[126] Struggling to find a distinction, the court concluded that, "the key distinction is that prong one deals with whether the officer's conduct *was* objectively unreasonable, whereas prong three deals with whether an objectively

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constitutional rights, those delineations have resulted in a contraction of rights, that is, more losses for plaintiffs. *See* Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 688-89 (2009) (arguing that once the court determines that qualified immunity is appropriate, it is reluctant to at the same time determine that a right has been violated). *But cf.* Paul W. Hughes, *Not a Failed Experiment:* Wilson-Saucier *Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401 (2009) (asserting that *Saucier* sequencing results in articulation of constitutional rights).

123. *See e.g.*, McCormick v. City of Fort Lauderdale, 333 F.3d 1234, 1246 (11th Cir. 2003); Ewolski v. City of Brunswick, 287 F.3d 492, 507 (6th Cir. 2002).

124. 499 F.3d 2 (1st Cir. 2007). *Jennings* grew out of a highly publicized raid by state authorities of a smoke shop run by the Narragansett Indian Tribe in Rhode Island. *Id.* at 3-4. Jennings was arrested during that raid and claimed that excessive force, resulting in a broken ankle, was used to restrain him. *Id.* at 5. Jennings sought damages against the police officer for battery under state law and damages for excessive force under § 1983. *Id.* After the jury awarded Jennings $301,000 in damages, the trial judge granted the police officer's post-verdict motion for judgment as a matter of law, stating that there was no evidence of a constitutional violation and even if there was, the defendant was entitled to qualified immunity. *Id.* at 6-7. The First Circuit, after re-hearing, reversed the trial judge and held that the plaintiff's Fourth Amendment rights were violated, that the right to be free from excessive force was clearly established, and that a reasonable police officer would have known his actions were a violation. *Id.* at 20-21. At the re-trial, the jury ruled in favor of the defendant police officer, determining that there was no Fourth Amendment violation because the officer acted reasonably. Jennings v. Jones, C.A. 03-572ML (D.R.I. July 29, 2008).

125. *Jennings*, 499 F.3d at 10 (citations omitted).

126. *Id.* at 18.

reasonable officer would have *believed* the conduct was unreasonable."[127] The difference between these two questions is difficult to grasp as both questions turn on the reasonableness of the defendant's understanding of the situation at the time the force was used and an assessment of the threat presented by the plaintiff. It is unclear how if the plaintiff's conduct was unreasonable, based on the facts known to him at the time, he nonetheless could have believed that his conduct was reasonable.

As the court in *Jennings* concedes, the third prong of the *Saucier* analysis "seems nonsensical at first blush."[128] However, soldiering on, the court gamely continues through the analysis and determines that the defendant violated the Fourth Amendment and is, not surprisingly given the similarity of the analysis, not entitled to qualified immunity.[129] One approach, then, post-*Saucier*, is for a court to focus its analysis of the Fourth Amendment issue and determine that excessive force was used, then rather cursorily deny qualified immunity.[130]

The cases in which a violation of the Fourth Amendment has been found and qualified immunity is granted to the defendants are even more analytically disingenuous. The courts either conduct only a brief analysis of whether a Fourth Amendment violation has occurred, and assuming it has, turn to the qualified immunity question,[131] or grant qualified immunity because the case law establishing the Fourth Amendment violation was unclear at the time the government official acted,[132] never reaching the second reasonableness issue. The difficulty presented by the three part test mandated by *Saucier* is avoided by breezing past the Fourth Amendment analysis or by truncating the qualified immunity analysis to the question of what law is clearly established. By focusing merely on the first or second prong of the *Saucier* test, these courts avoid the difficulty of grappling with all three inquiries.

Even the Supreme Court had trouble following the regime it set forth in *Saucier*. In *Brosseau v. Hagen*,[133] the Court addressed the question of whether a police officer who shot a fleeing suspect violated the Fourth Amendment and whether he was entitled to qualified immunity.[134] Rather than addressing the Fourth Amendment violation, the Court merely adopted the court of appeals conclusion that there was a constitutional violation: "We express no view as to the correctness of the Court of Appeals' decision on the constitutional question

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127. *Id.*

128. *Id.*

129. *Id.* at 20.

130. *See, e.g.*, Cortez v. McCauley, 478 F.3d 1108, 1128 (10th Cir. 2007); Smoak v. Hall, 460 F.3d 768, 783 (6th Cir. 2006); Clem v. Corbeau, 284 F.3d 543, 550 (4th Cir. 2002).

131. *See, e.g.*, Humphrey v. Mabry, 482 F.3d 840, 846-47 (6th Cir. 2007); Parks v. Pomeroy, 387 F.3d 949, 957-58 (8th Cir. 2004); Carswell v. Borough of Homestead, 381 F.3d 235, 240 (3d Cir. 2004).

132. *See, e.g.*, Waterman v. Batton, 393 F.3d 471, 483 (4th Cir. 2005); Smith v. Wampler, 108 F. App'x 560, 566 (10th Cir. 2004); Ross v. City of Ontario, 66 F. App'x 93, 96 (9th Cir. 2003).

133. 543 U.S. 194 (2004).

134. *Id.* at 194-95.

itself."[135] Instead, the Court focused on the qualified immunity analysis and determined that the lower court was incorrect in denying the defense.[136] Indeed, Justice Breyer in his concurrence suggested that the requirement of considering the constitutional issue separately from the qualified immunity issue made little sense.[137] In *Scott v. Harris*,[138] the Court was faced with the question of whether a police pursuit that resulted in a collision that severely injured a fleeing motorist violated the Fourth Amendment and, if so, whether the defendants' were nonetheless entitled to qualified immunity.[139] Again avoiding a separate analysis of the Fourth Amendment excessive force issue and the qualified immunity issue, the Court concluded, based largely on a videotape of the police chase in question, that the Fourth Amendment had not been violated.[140]

Just as pressure built up prior to *Saucier* for the Court to provide additional guidance for the thorny problems created by qualified immunity and excessive force, again in the years post-*Saucier* the Court was faced with considerable discontent with the regime it had mandated. As illustrated above, lower courts found ways to avoid the strictures of the three prong test. Commentators also began to question the wisdom of *Saucier*. Most of the criticism of *Saucier* centered on the "order-of-battle" aspect of the qualified immunity test.[141] That is, that the court must *first* determine that a constitutional violation has been alleged and the only *secondly* analyze whether the defendant is entitled to qualified immunity. Justice Breyer criticized this aspect of the *Saucier* rule lamenting that the current rule "rigidly requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the decision (*e.g.*, qualified immunity) that will satisfactorily resolve the case before the court."[142] Others argued that the benefit of forcing courts to clearly articulate

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135. *Id.* at 198. Even though the Court did not follow the two-step process outlined in *Saucier*, it reaffirmed its instructions that the constitutional issue must be addressed separately from the qualified immunity issue. *Id.* at 198 n.3.

136. *Id.* at 201 (finding the defendant's actions "fell in the 'hazy border between excessive and acceptable force'" (quoting Saucier v. Katz, 533 U.S. 194, 206 (2001))).

137. *Id.* (Breyer, J., concurring) ("I am concerned that the current rule rigidly requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the decision (*e.g.*, qualified immunity) that will satisfactorily resolve the case before the court.").

138. 550 U.S. 372 (2007).

139. *Id.* at 375-76.

140. *Id.* at 384. Many commentators have critiqued the Court's unusual step in acting as the fact finder based solely on the evidence presented by the videotape. *E.g.*, Erwin Chermerinsky, *A Troubling Take on Excessive Force Claims*, 43 TRIAL 74 (2007); George M. Dery, III, *The Needless "Slosh" Through the "Morass of Reasonableness": The Supreme Court's Usurpation of Fact Finding Powers in Assessing Reasonable Force in* Scott v. Harris, 18 GEO. MASON U. CIV. RTS. L.J. 417 (2008); Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

141. *E.g.*, Michael L. Wells, *The "Order of Battle" in Constitutional Litigation*, 60 SMU L. REV. 1539 (2007).

142. *Brosseau*, 543 U.S. at 201 (Breyer, J., concurring).

constitutional standards outweighed the disadvantages of the regime.[143]

Although the critiques were framed in terms of the "order-of-battle" requirement, the problem was, of course, exacerbated, at least in the excessive force context, by the difficulty in untangling the merits of the Fourth Amendment claim from the qualified immunity defense. It especially made no sense to require a court to separately analyze the constitutional claim and qualified immunity when the two questions, were, in effect, the same.

In 2009, several decades after the standards developed in *Graham* and *Harlow*, the Court again attempted to bring order and coherence to an inherently unworkable doctrine. Apparently bowing to the pressures from both within and without, the Court has again revised the qualified immunity doctrine.

B. Pearson v. Callahan

In an unusual move, the Supreme Court, on its own, in *Pearson v. Callahan*, sought review of the question of whether *Saucier*'s approach to qualified immunity should be overruled.[144] The *Pearson* case involved a denial by the Tenth Circuit Court of Appeals of qualified immunity for a warrantless search of the plaintiff's home.[145] The Supreme Court granted certiorari on the questions of whether the defendants' search of the home violated the Fourth Amendment, whether the defendants were entitled to qualified immunity, and added the question of whether *Saucier* should be overruled.[146]

The police officers as petitioners argued that *Saucier*'s mandate that the constitutional issue be resolved first, before a court moves to the question of qualified immunity, either be entirely overruled or modified.[147] The petitioner

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143. Wells, *supra* note 141, at 1554.

144. Pearson v. Callahan, 128 S. Ct. 1702 (2008) ("In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: 'Whether the Court's decision in *Saucier v. Katz* should be overruled?'" (citation omitted)). Numerous critiques of the workability of the *Saucier* two-step mandate preceded the Court's unusual step. *See, e.g.*, *The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 214 (2007); Wells, *supra* note 141, at 1539-43 (defending the *Saucier* rule, while noting numerous criticisms of the doctrine).

145. Callahan v. Millard County, 494 F.3d 891, 893-94 (10th Cir. 2007), *rev'd*, 129 S. Ct. 808 (2009). The issue in *Callahan* was whether police entry into the plaintiff's home without a warrant violated his Fourth Amendment rights, given that there were no exigent circumstances. *Id.* The defendant argued that consent to enter was given to his confidential informant and so it was reasonable for the defendant to enter. *Id.*

146. Pearson v. Callahan, 129 S. Ct. 808, 813 (2009). Sam Kamin has taken the position that *Saucier* should not be overruled and that to allow courts to reach the qualified immunity issue, without first determining whether the constitution has been violated will be contrary Article III's ban on advisory opinions. Sam Kamin, *An Article III Defense of Merits-First Decisionmaking in Civil Rights Litigation: The Continued Viability of* Saucier v. Katz, 16 GEO. MASON L. REV. 53, 55-57 (2008).

147. Brief for Petitioner at 55, Pearson v. Callahan, 129 S. Ct. 808 (2009) (No. 07-751), 2008 WL 2367229; *see* Brief for the United States as Amicus Curiae Supporting Petitioners at 23,

argued that the *Saucier* "order of battle" rule should be abandoned in Fourth Amendment cases, or at least in Fourth Amendment cases involving the unconstitutional seizure of evidence.[148] The development of constitutional standards, one goal of *Saucier*'s requirement that the constitutional issue be addressed before qualified immunity, is not necessary in Fourth Amendment cases because the constitutional issues are frequently litigated in the course of criminal prosecutions.[149] Accordingly, the petitioners argued, the court should be able to address the qualified immunity issue without first resolving whether a Fourth Amendment violation has occurred.[150]

Similarly, the United States as amicus curiae argued that the *Saucier* "two-step approach" should not be mandatory.[151] Although there may sometimes be benefits to resolving the constitutional question before reaching qualified immunity, the United States suggested that discretion should be left with the lower courts with respect to the order of resolving the issues.[152] Significantly, the United States identified one of the benefits of resolving the constitutional issue first as the defendant getting the benefit of the double reasonableness inherent in the Fourth Amendment and qualified immunity standards.[153] If a court avoids the Fourth Amendment issue and turns only to qualified immunity the "risk of conflating [the two standards] . . . would be exacerbated."[154] Even though "courts have had difficulties" with the task of separating the Fourth Amendment standard from qualified immunity, addressing them separately "ensures that courts will treat the two forms of 'reasonableness' as distinct and that the important interests protected by the qualified-immunity doctrine will be served."[155] Notwithstanding the benefit of adhering to the *Saucier* mandate, the

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Pearson v. Callahan, 129 S. Ct. 808 (2009) (No. 07-751) (arguing for a modification, but stating that there was "no reason . . . to overrule [*Saucier*]").

148. Brief for Petitioner, *supra* note 147, at 56-60. When the resolution of the qualified immunity issue is particularly fact intensive, the trial court should bypass the constitutional issue and go directly to qualified immunity. *Id.*

149. *Id.* at 57-58.

150. *Id.* at 58-59. The petitioner argues that the *Saucier* rule is particularly inapposite in Fourth Amendment cases involving the seizure of evidence since those issues are litigated so frequently in criminal cases. *Id.* However, Fourth Amendment issues, such as excessive force, which are not litigated in criminal court, might still be subject to the *Saucier* rule. *Id.*

151. Brief for the United States as Amicus Curiae Supporting Petitioners, *supra* note 147.

152. *Id.* at 30.

153. *Id.* at 26-27.

154. *Id.*

155. *Id.* at 27; *e.g.*, Brief for the Nat'l Campaign to Restore Civil Rights as Amicus Curiae in Support of Respondent, Pearson v. Callahan, 129 S. Ct. 808 (2009) (No. 07-751), 2008 WL 3831555; Brief of Liberty Legal Inst. as Amicus Curiae in Support of Respondent Afton Callahan, Pearson v. Callahan, 129 S. Ct. 808 (2009) (No. 07-751), 2008 WL 3851625; Brief of Amici Curiae Nat'l Police Accountability Project & Ass'n of Am. Justice in Support of Respondent, Pearson v. Callahan, 129 S. Ct. 808 (2009) (No. 07-751), 2008 WL 3851626; Brief Amicus Curiae of the ACLU in Support of Respondent, Pearson v. Callahan, 129 S. Ct. 808 (2009) (No. 07-751), 2008

United States argued that the lower courts should have discretion in deciding whether to first address the question of whether there has been a violation of the Fourth Amendment.

Respondent, and many amice, took the position that the *Saucier* two-step process should not be overruled or modified.[156] Rather than seeing the two-step process as an advantage for defendants in civil rights cases, respondent argued that the benefit of establishing clear constitutional precedent by requiring courts to address the constitutional question at issue outweighs the disadvantages of the two-step process.[157] If the two-step process can be avoided, constitutional law will not be developed and defendants will continually be able to claim that they are entitled to qualified immunity because of lack of clarity in the law.[158]

Rather predictably, given that it raised the issue, the Court issued a unanimous opinion written by Justice Alito overruling the requirement of *Saucier* that a court first resolve the constitutional issue before reaching qualified immunity, concluding that a "mandatory, two-step rule for resolving all qualified immunity claims should not be retained."[159] Rather, lower court judges "should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."[160] The Court determined that the requirement that the constitutional violation be analyzed before turning to the issue of qualified immunity was inefficient, sometimes resulted in insufficiently briefed and reasoned decisions, could make appellate review of the constitutional ruling difficult, and generally was contrary to the general rule of the avoidance of constitutional issues.[161]

Although the discussion in *Pearson* focused on the problems with unnecessarily addressing a constitutional issue when a court can resolve a case by deciding that the defendant is entitled to qualified immunity, the problem is more fundamentally that the two standards are the same in the Fourth Amendment context. If the Court now allows the lower courts to bypass a

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WL 3851627.

156. Brief of Respondent at 48-49, Pearson v. Callahan, 129 S. Ct. 808 (2009) (No. 07-751), 2008 WL 3895481 (doubting whether *Pearson* is an appropriate case to bring up the continued viability of *Saucier*); *see* Wells, *supra* note 141 (outlining benefits of two step regime).

157. Brief of Respondent, *supra* note 156, at 51-52.

158. Brief for Nat'l Campaign to Restore Civil Rights as Amicus Curaie in Support of Respondent, *supra* note 155, at 3; Brief of Liberty Legal Inst. as Amicus Curaie in Support of Respondent, *supra* note 155, at 15.

159. *Pearson*, 129 S. Ct. at 817.

160. *Id.* at 818.

161. *Id.* at 818-21. The Court downplayed the concern that by allowing courts to avoid constitutional issues, new constitutional norms would never be clearly established reasoning that constitutional norms could be developed in criminal cases, in cases against municipalities, or in cases that seek injunctive relief. *Id.* at 822. The Court noted that "the development of constitutional law is by no means entirely dependent on cases in which the defendant may seek qualified immunity." *Id.* at 821-22.

separate analysis of the excessive force issue, it seems inevitable that the two standards will collapse bringing us back to the situation that existed pre-*Saucier*.[162] Some courts will, in effect, conflate the excessive force and qualified immunity standards. Others will attempt to separate them, thus providing additional protection to defendants by applying reasonableness twice. Rather than address the heart of the conflicts inherent in qualified immunity, the Court in *Pearson* merely provided a mechanism to paper over those problems.

III. A NEW LEGAL STANDARD FOR QUALIFIED IMMUNITY IN EXCESSIVE FORCE CLAIMS

The problems that bubbled up to the Court in *Saucier*, and now in *Pearson*, are not merely based on the order of the inquiry in a qualified immunity analysis, but rather are caused by the unworkability of combining the Fourth Amendment constitutional standard with qualified immunity. Although *Pearson* applied another temporary fix to the problem by allowing courts to forego a constitutional analysis and focus only on qualified immunity, the underlying problem remains unchanged. Rather than looking at the order in which the issues are decided in a Fourth Amendment civil rights action, a more radical solution is needed that addresses the heart of the difficulty.

The current regime poses at least three questions in resolving qualified immunity in an excessive force case: 1) whether the facts establish an unreasonable use of force; 2) whether the unreasonableness of that use of force was clearly established at the time of the defendant's actions; and 3) whether an objectively reasonable official would have known that his actions violated the clearly established right. The incoherency of this regime becomes most acute when a court attempts to answer the third inquiry—whether the reasonable official would have known that his actions violate a clearly established right.[163] Given that it has already determined that the amount of force used was unreasonable, the court must now somehow apply another level of reasonableness to the facts. To alleviate that problem, the qualified immunity standard, at least in the excessive force context, should become a purely legal question—does the determination that the defendant's actions violate the Fourth Amendment represent a new development in the law? Rather than three questions, the court will resolve only two: 1) whether the facts establish an unreasonable use of force; and 2) whether a new legal standard has been applied by the court.

For example, in the *Jennings v. Pare* factual scenario discussed earlier,[164] the

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162. As one amicus points out, "lower courts have struggled in their application of qualified immunity in the use-of-force context" resulting in lower standards for police behavior. Brief of Amicus Curiae Nat'l Police Accountability, Project & Ass'n of American Justice in Support of Respondent, *supra* note 155, at 20-21.

163. *See* Catlett, *supra* note 7, at 1052-54 (noting that apart from assessing reasonableness, even determining what is "clearly established" can be problematic).

164. *See supra* Part I.A-B.

court would determine whether the police officer's twisting of the plaintiff's ankle violated the Fourth Amendment. To do that the court would determine whether the officer's actions were reasonable given the circumstances apparent to the officer at the time he acted. Consideration would be given to the factors outlined in *Graham*, such as the severity of the crime the plaintiff was thought to be committing, the threat the plaintiff posed to the officer or to others, and whether the plaintiff was resisting arrest. If the court determined that a Fourth Amendment violation had occurred, the only task left for qualified immunity would be to ascertain if the Fourth Amendment standard applied represented a departure from settled law. If not, then the defendant would not be entitled to qualified immunity.

This reformulation would provide critical protection for the defendant from being held responsible for predicting novel developments in the law. This concern, after all, was one of the primary motivating forces behind the adoption of qualified immunity.[165] The new standard would also make the qualified immunity question purely a legal one, thus eliminating confusion between the roles of the judge and the jury. It is the second reasonableness inquiry that creates questions of fact in a qualified immunity analysis—a court could address purely as a legal matter whether it is adopting new law while omitting the confusing and unnecessary second inquiry into reasonableness.

Of course, determining whether new law has been developed is not a simple task. As Chaim Saiman has pointed out, law created by courts is not framed as the articulation of new black letter rules, but rather by the application of precedent to a particular set of facts.[166] Notwithstanding these difficulties, however, certain kinds of decisions could be relatively clearly identified as creating new legal standards. For example, *Graham* itself, which announced for the first time that the Fourth Amendment would be the framework in which seizures made with excessive force are analyzed, represented a break with the past and an articulation of new standards.[167] Similarly, an analysis which explicitly repudiates or overrules prior cases would also be a new development in the law. A decision which applied a well established general standard to a new set of facts would likely not be developing new law. Only in those game changing moments when a police officer's behavior is being evaluated by a genuinely new standard would qualified immunity come into play to protect a police officer caught in between old and new constitutional standards.

Because articulations of genuinely new law are rare, the result of such a reformulated qualified immunity standard would be that qualified immunity would rarely be granted in excessive force cases. One result might be that government officials would more often be found liable for unconstitutional acts. This might well have a beneficial impact on the behavior of police officers and

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165. Pierson v. Ray, 386 U.S. 547, 557 (1967) (noting that qualified immunity is necessary because police officers should not be charged "with predicting the future course of constitutional law").

166. Chaim Saiman, *Interpreting Immunity*, 7 U. PA. J. CONST. L. 1155, 1156-57 (2003).

167. *See* Graham v. Connor, 490 U.S. 386, 393-95 (1989).

the training they receive. More likely, however, is that cases will be resolved on the basis of the Fourth Amendment rather than because of the qualified immunity defense. It is quite possible that defendants would not lose appreciably more § 1983 cases, only that the basis for a defendant's success would be the requirements of the Fourth Amendment rather than qualified immunity.

Requiring that the Fourth Amendment, rather than qualified immunity, do the work of determining which police behaviors should be sanctioned and which should be excused, will lead to more clarity for the guidance of police officers and also more open understanding by the public of the range of permissible police behavior. The elimination of the obfuscation provided by qualified immunity may make it more possible to have a constructive discussion concerning the appropriate use of police force and the remedies for abuses of that force. Reforming the legal regime to provide a more meaningful deterrent to police violence can start by making the rules applicable to such claims more simple and coherent.

CONCLUSION

Over the past thirty years, courts and litigants have attempted to forge a workable regime for applying qualified immunity in excessive force cases. These attempts have been largely unsuccessful and have led to an increasingly complicated and unsatisfactory set of steps that a district court must execute when these cases arise. Because of its complexity and incoherence, the current system seems to work for no one—not police defendants, not judges, and most particularly not victims of police abuse. It has become apparent that periodic fixes by the Supreme Court will not solve the problem—a more profound rethinking of the doctrine is required.

In excessive force cases the qualified immunity defense should be modified to eliminate the reasonableness inquiry, allowing the Fourth Amendment to do the work of assessing reasonableness. This change would go a long way toward simplifying and reforming the defense. Other changes in the doctrine may well also be necessary to create a more usable and rational system. If the current approach is left intact without any profound alternations, the promise of § 1983 as a meaningful remedy to police abuse will be unfulfilled, and judges will be left to dance through a complex set of steps without any music to give it meaning.

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NOTES

DROP-DOWN LISTS AND THE COMMUNICATIONS DECENCY ACT: A CREATION CONUNDRUM

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INTRODUCTION

The Internet is a vast medium for expressing ideas, expanding commerce, and exchanging information of all kinds. In addition to these socially beneficial activities, the Internet provides opportunities to achieve less desirable ends, such as defamation,[1] fraud,[2] and housing discrimination.[3] Multiple parties may contribute to the wrong, including the individual computer user who "posted" the offensive online content and the Internet service provider whose website the individual used to accomplish his act.[4] Determining legal responsibility for these acts has concerned courts and Congress since the early days of the Internet.[5] In 1996, Congress amended the Telecommunications Act of 1996 with the Communications Decency Act, codified at § 230 of title 47 of the U.S. Code ("§ 230"), effectively eliminating websites' liability for content they did not create or develop.[6] More recently, courts have begun to face the issues presented by limited sets of pre-populated content, such as drop-down lists, that websites make

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1. *See, e.g.*, Whitney Info. Network, Inc. v. Xcentric Ventures, L.L.C., No. 2:04-cv-47-FtM-34SPC, 2008 WL 450095, at *5-6 (M.D. Fla. Feb. 15, 2008).

2. *See, e.g.*, Anthony v. Yahoo! Inc., 421 F. Supp. 2d 1257, 1259, 1262 (N.D. Cal. 2006).

3. *See, e.g.*, Fair Hous. Council v. Roommates.com, L.L.C., 521 F.3d 1157, 1166 (9th Cir. 2008) (en banc).

4. *See, e.g.*, Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 671-72 (7th Cir. 2008); MCW, Inc. v. Badbusinessbureau.com, L.L.C., No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at *10 (N.D. Tex. Apr. 19, 2004).

5. *See* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 139 (S.D.N.Y. 1991) (determining liability for allegedly defamatory statements carried in a publication on CompuServe's database).

6. 47 U.S.C. § 230 (2006).

available to their users.[7] Pre-populated content differs from other types of user-generated Internet content because the website actually authors the list of options it provides; the user merely selects from that list.[8] Therefore, the website arguably creates or develops the user's ultimate selection and cannot use § 230 to shield it from liability should a court ultimately find the resulting content to be unlawful.[9] Conversely, because the website user unilaterally selects from the available options, he is conceivably the sole creator of the resulting content.

This Note examines whether drop-down lists and other pre-populated content restrict a user's available input, making the website a creator or developer of the user-selected content, and evaluates possible approaches courts might take to such a question. Part I of this Note traces the history of liability for Internet content. Part II explains relevant statutory definitions and their interpretations by courts. Part III examines recent cases dealing specifically with pre-populated content. Part IV analyzes the problems with courts' current applications of § 230 to pre-populated content. Part V assesses possible approaches to liability for pre-populated content and concludes with a set of standards courts can apply to judge website liability for pre-populated content.

I. HISTORY OF LIABILITY FOR INTERNET CONTENT

The ability of users to manipulate and provide Internet content has grown with the medium.[10] Increased Internet speech naturally yields to more conflicts over that speech.[11] Because the common law evolved to deal with speech in print media, it has not been perfectly suited to application on the Internet.[12]

A. Evolution of Internet Content

Today's Internet differs substantially from the "walled garden" Internet world of the 1990s, where Internet service providers (ISPs) such as America

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7. *See, e.g.*, *Roommates.com*, 521 F.3d at 1165.

8. For the purposes of this Note, pre-populated content is information formulated by a website and provided as a choice or option to the user. Examples include drop-down lists, check boxes, and radio button selections.

9. *See* § 230(f)(3), (c)(1).

10. *See* Cecilia Ziniti, Note, *The Optimal Liability System for Online Service Providers: How* Zeran v. America Online *Got It Right and Web 2.0 Proves It*, 23 BERKELEY TECH. L.J. 583, 590 (2008).

11. *See* Brandy Jennifer Glad, Comment, *Determining What Constitutes Creation or Development of Content Under the Communications Decency Act*, 34 SW. U. L. REV. 247, 247-48 (2004) (discussing the expansion of Internet communication and the resultant struggle between free speech and traditional defamation rules).

12. *See* Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137, 145-46 (2008); *see also* Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) (noting Congress's recognition that tort claims threatened freedom of speech on the Internet); Ziniti, *supra* note 10, at 584-85 (discussing the unfair result of the application of common law principles to an Internet defamation claim).

Online controlled the information and websites that users could access.[13] During that era, a website provided information and advertising via static web pages, and users had no practical ability to add their own content to the sites.[14] Due in part to increased competition in the dial-up access market and the proliferation of broadband access, the "walls" of the walled garden world began to crumble,[15] and websites began to offer users the ability to interact with the content on their sites.[16]

The increase in user-website interaction was possible largely through the use of graphical user interfaces (GUIs), which permitted users to interact directly with the content on the screen, typically by using a mouse.[17] GUIs include familiar items such as clickable icons, windows, and scrollbars.[18] GUIs were a significant advance over traditional command line interfaces (CLIs) because GUIs allowed a user to execute a computer operation by selecting a graphic representation of the command, rather than forcing the user to type in a string of text, as CLIs required.[19] In the mid-1970s, Xerox researchers developed the first GUIs,[20] but the most important GUI pioneer was Apple computer.[21] In 1983 Apple released its short-lived "Lisa" computer, which incorporated the first GUI commonly known today as a drop-down list.[22] GUIs are the norm in modern software applications[23] and have become particularly important in web browsing applications.[24] Drop-down interfaces in particular have gained widespread application in both traditional and Internet environments because they are easy for the average non-tech savvy computer user to manipulate, and they use relatively little screen space.[25]

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13. *See* Ciolli, *supra* note 12, at 166. The term "walled garden" refers to the idea that ISPs allowed users access to only a small area of the total online world. *Id.*

14. *See id.* at 168; Ziniti, *supra* note 10, at 590.

15. *See* Ciolli, *supra* note 12, at 172-73, 176.

16. *See id.* at 179; Ziniti, *supra* note 10, at 591-92.

17. The Linux Information Project, GUI Definition, http://www.linfo.org/gui.html (last visited Oct. 13, 2009).

18. ERIC STEVEN RAYMOND & ROB W. LANDLEY, THE ART OF UNIX USABILITY (2004), http://www.catb.org/~esr/writings/taouu/html/ch02s05.html.

19. *See* The Linux Information Project, Command Line Definition, http://www.linfo.org/command_line.html (last visited May 24, 2009).

20. RAYMOND & LANDLEY, *supra* note 18.

21. Jeremy Reimer, *A History of the GUI*, ARS TECHNICA, May 5, 2003, http://arstechnica.com/old/content/2005/05/gui.ars/4.

22. *Id.*; RAYMOND & LANDLEY, *supra* note 18.

23. *See* User Customizable Drop-Down Control List for GUI Software Applications, U.S. Patent Application No. 20090007009 (filed Jan. 1, 2009).

24. The Linux Information Project, GUI Definition, *supra* note 17.

25. *But see* Krisha Kumar, *Replacing the HTML Drop-Down Control*, THOUGHT CLUSTERS: SOFTWARE, DEVELOPMENT AND MGMT., Jan. 12, 2008, http://www.thoughtclusters.com/2008/01replacing-the-drop-down-control (describing the shortcomings of dropdown lists in addition to their benefits).

B. Applying the Law to Internet Content

Traditional print publication standards for defamation arose from the common law.[26] Under the common law of defamation as applied to print publications, courts treat publishers, and distributors differently.[27] Publishers, such as newspapers, are liable for defamatory material they publish, regardless of knowledge of the material's unlawful nature because they have editorial control over that material.[28] Distributors, such as booksellers, are liable only for distributing material they know or should know to be defamatory and may escape "republisher" liability if they remove defamatory material from distribution once they have knowledge of the material's defamatory nature.[29]

In 1991, a federal district court in New York applied traditional print publication standards to find Internet service provider CompuServe not liable for alleged defamatory content posted on one of its forums.[30] In *Cubby, Inc. v. CompuServe, Inc.*,[31] the district court held that CompuServe had no editorial control over the information at issue and, thus, was subject to liability only as a distributor of the content, that is, if it "knew or had reason to know of the allegedly defamatory" statements.[32]

Four years later in *Stratton Oakmont, Inc. v. Prodigy Services Co.*,[33] a New York court held an ISP to the stricter "publisher" standard and found it liable for content posted on one of its online bulletin boards.[34] The court reasoned that the ISP was liable because it "held itself out to the public and its members as controlling the content of its computer bulletin boards," and it "actively utiliz[ed] technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and 'bad taste' . . . and such decisions constitute editorial control."[35]

In 1996, largely in response to the holding in *Stratton Oakmont*,[36] Congress enacted § 509 of the Communications Decency Act, codified at § 230 of title 47 of the U.S. Code.[37] In passing § 230, Congress sought to limit *Stratton*

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26. *See* Sewali K. Patel, Note, *Immunizing Internet Service Providers from Third-Party Internet Defamation Claims: How Far Should Courts Go?*, 55 VAND. L. REV. 647, 654-57 (2002).

27. *Id.* at 656-58.

28. *See id.* at 656-57.

29. *See id.* at 657-58.

30. Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 141 (S.D.N.Y. 1991).

31. *Id.*

32. *Id.* at 140-41.

33. No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, Communications Decency Act, Pub. L. No. 104-104, 110 Stat. 137 (1996).

34. *Id.* at *4-6.

35. *Id.* at *4.

36. *See* Barrett v. Rosenthal, 146 P.3d 510, 516 (Cal. 2006) (noting that "[§ 230's] legislative history indicates that [it] was enacted in response to [*Stratton Oakmont*]").

37. 47 U.S.C. § 230 (2006).

Oakmont's "backward" result of imposing stricter liability over those ISPs who "tried to exercise some control over offensive material."[38] As Congress noted at the time, "[o]ne of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material."[39]

Section 230 provides in pertinent part: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[40] The statute is designed to further several policies:

> (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
> (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
> (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
> (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
> (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.[41]

In apparent recognition of § 230's potentially far reach, Congress included a section defining the statute's effect on other areas of the law.[42] Specifically, Congress provided that § 230 have no effect on federal criminal statutes, intellectual property law, federal or state communications privacy law, or any state law "consistent with this section."[43] However, the statute specifically prohibits liability for ordinary state law claims, such as contract actions and defamation claims that do not fall within the specific exemptions.[44]

Beginning with *Zeran v. America Online, Inc.*,[45] courts have interpreted §

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38. 141 CONG. REC. H8460-01 (1995).

39. H.R. CONF. REP. NO. 104-458, at 194 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 10.

40. § 230(c)(1).

41. *Id.* § 230(b).

42. *Id.* § 230(e).

43. *Id.*

44. *Id.* § 230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.").

45. 129 F.3d 327 (4th Cir. 1997).

230 immunity expansively.[46] *Zeran* held that § 230 immunized "distributors" as well as "publishers" of third party Internet content.[47] Traditionally, publishers need not have knowledge of the existence of unlawful content in their publications in order to be liable for that content.[48] In contrast, distributors, such as news vendors or booksellers, must have actual knowledge of the unlawful nature of the content in order to be liable.[49] The *Zeran* court concluded § 230's instruction that "[n]o provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider"[50] applied equally to distributors with notice of unlawful content.[51] The court further noted that introducing tort liability to the Internet would chill speech in an arena where the right to speak freely is meant to be particularly robust.[52] Post-*Zeran* courts "have construed the immunity provisions in § 230 broadly in all cases arising from the publication of user-generated content."[53]

II. WHO IS AN "INFORMATION CONTENT PROVIDER"?

Because § 230 provides immunity only for information provided by *another* information content provider,[54] a website can be liable when it is found to be the provider of content. The meaning of "information content provider" is paramount. The statute and case law help elucidate the meaning of the statutory language.[55]

Section 230 provides definitions for some of its key terminology.[56] Under the statute, an "interactive computer service" is "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." Courts have recognized the statutory

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46. *See* Barrett v. Rosenthal, 146 P.3d 510, 518 (Cal. 2006) (discussing the broad acceptance in both federal and state courts of the *Zeran* holding).

47. *Zeran*, 129 F.3d at 334. Despite arguments that Internet service providers should be liable as contributors of content, *see, e.g.*, Patel, *supra* note 26, at 653, *Zeran* and subsequent courts have found § 230 immunizes both distributors and publishers from liability for defamatory Internet content, *see Barrett*, 146 P.3d at 513; *Doe v. Am. Online Inc.*, 783 So. 2d 1010, 1017 (Fla. 2001).

48. *Zeran*, 129 F.3d at 331 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 810 (5th ed. 1984)).

49. *Id.* (citing KEETON ET AL., *supra* note 48, at 811).

50. 47 U.S.C. § 230(c)(1) (2006).

51. *See Zeran*, 129 F.3d at 333.

52. *See id.* at 331.

53. Doe v. MySpace, Inc., 528 F.3d 413, 418 (5th Cir. 2008).

54. § 230(c)(1).

55. *See, e.g.*, § 230(f)(3); Fair Hous. Council v. Roommates.com, L.L.C., 521 F.3d 1157, 1162-63 (9th Cir. 2008) (en banc).

56. *See* § 230(f).

definition of "interactive computer service" "includes a wide range of cyberspace services"[57] and "the most common . . . are websites."[58]

Section 230 further defines "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."[59] Although "content" is neither explicitly addressed by courts nor defined in the statute, courts have recognized e-mail listservs,[60] message boards,[61] dating and other "matching" websites,[62] and chat rooms[63] as generating the content at issue in § 230 cases. Additionally, courts have recognized the statutory immunity defense against claims including defamation,[64] negligence,[65] infringement of free speech,[66] intentional infliction of emotional distress,[67] violation of the Fair Housing Act,[68] violation of Title II of the Civil Rights Act,[69] fraud,[70] and breach of contract.[71]

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57. Batzel v. Smith, 333 F.3d 1018, 1030 n.15 (9th Cir. 2003).

58. *Roommates.com*, 521 F.3d at 1162 n.6.

59. § 230(f)(3).

60. *Batzel*, 333 F.3d at 1018.

61. Krinsky v. Doe 6, 72 Cal. Rptr. 3d 231, 234 (Ct. App. 2008).

62. *See* Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 668 (7th Cir. 2008); *Roommates.com*, 521 F.3d at 1161-62; Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1121 (9th Cir. 2003).

63. *See* Green v. Am. Online, 318 F.3d 465, 468-69 (3rd Cir. 2003).

64. *See, e.g.*, Whitney Info. Network, Inc. v. Xcentric Ventures, L.L.C., No. 2:04-cv-47-FtM-34SPC, 2008 WL 450095, at *2 (M.D. Fla. Feb. 15, 2008) (claiming website owner contributed to user-posted content defaming his business).

65. *See* Doe v. MySpace, Inc., 528 F.3d 413, 416 (5th Cir. 2008) (claiming negligence against social networking website for failing to prevent thirteen-year-old girl from lying about her age, when the girl was sexually assaulted by alleged predator she met through the website).

66. *See* e360Insight, L.L.C. v. Comcast Corp., 546 F. Supp. 2d 605, 606-07 (N.D. Ill. 2008) (claiming that internet service provider's blocking of mass e-mails to ISP's customers violated e-mailers First Amendment right to free speech).

67. *See* Doe v. Friendfinder Network, Inc., 540 F. Supp. 2d 288, 292-93 (D.N.H. 2008) (claiming for emotional distress against dating website for profile posted by unknown third party impersonating plaintiff).

68. *See* Fair Hous. Council v. Roommates.com, L.L.C., 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc) (claiming that defendant's roommate-matching website violated provisions of 42 U.S.C. § 3604 prohibiting publication of discriminatory housing advertisements); *see also* Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 668 (7th Cir. 2008).

69. *See* Noah v. AOL Time Warner, Inc., 261 F. Supp. 2d 532, 534 (E.D. Va. 2003) (claiming ISP failed to protect Muslin user from religion-based harassment by other users).

70. *See* Anthony v. Yahoo! Inc., 421 F. Supp. 2d 1257, 1262 (N.D. Cal. 2006) (claiming dating website fraudulently used fake profiles to trick user into subscribing to the dating service).

71. *See id.* at 1260-61.

A. Creation or Development

The critical language when analyzing whether a website is an information content provider is "creation or development."[72] Section 230 does not specifically define "creation or development," though courts have given the concept a variety of meanings.[73] Further, whether or not a website creates or develops content ultimately turns on whether it "is *responsible*, in whole or in part, for the creation or development of information."[74]

Courts have generally found that traditional editorial functions such as deleting inaccurate information[75] and making other "minor alterations"[76] do not constitute creation or development.[77] In *Batzel v. Smith*,[78] a listserv operator claimed § 230 immunity to successfully defeat a defamation claim.[79] The *Batzel* court found "[t]he 'development of information' therefore means something more substantial than merely editing portions of an e-mail and selecting material for publication."[80] The *Batzel* dissent disagreed, finding that selecting a third party's e-mail message for publication effectively alters its meaning, "adding to the message the unstated suggestion that [Defendant] deemed the message worthy of readers' attention."[81] A similar view was advanced in *Anthony v. Yahoo! Inc.*,[82] where a court found § 230 not applicable because the plaintiff claimed the defendant's manner of presenting undisputedly third party information constituted development of that information.[83] Most courts reject this view.[84]

B. Solicitation

When courts consider the context of the website receiving the information in addition to the website owner's actions, the question of creation or development is often closer. In *Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*,[85] the court found a website soliciting reports of consumers' negative

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72. *See* 47 U.S.C. § 230(c)(1), (f)(3) (2006).

73. *See, e.g.*, Batzel v. Smith, 333 F.3d 1018, 1031 (9th Cir. 2003); Ben Ezra, Weinstein, & Co., Inc. v. Am. Online, Inc., 206 F.3d 980, 986 (10th Cir. 2000); Hy Cite Corp. v. badbusinessbureau.com, L.L.C., 418 F. Supp. 2d 1142, 1148-49 (D. Ariz. 2005).

74. § 230(f)(3) (emphasis added).

75. *Ben Ezra*, 206 F.3d at 986 (finding that "[b]y deleting the allegedly inaccurate stock quotation information, Defendant was simply engaging in the editorial functions Congress sought to protect").

76. *Batzel*, 333 F.3d at 1031.

77. *See id.*

78. *See id.*

79. *Id.*

80. *Id.*

81. *Id.* at 1040 (Gould, J., dissenting in part).

82. 421 F. Supp. 2d 1257 (N.D. Cal. 2006).

83. *Id.* at 1263.

84. *See, e.g.*, Doe v. Friendfinder Network, Inc., 540 F. Supp. 2d 288, 298 n.9 (D.N.H. 2008).

85. 418 F. Supp. 2d 1142 (D. Ariz. 2005).

experiences with businesses by offering compensation could "arguably" be found "responsible . . . for the creation or development of information" provided by consumers in response to the solicitation.[86]

Some courts have compared soliciting a particular type of content to its development.[87] In *F.T.C. v. Accusearch, Inc.*,[88] the Tenth Circuit held that § 230 did not protect a website from a Federal Trade Commission claim that it engaged in unfair business practices by obtaining and marketing confidential phone records.[89] By making confidential telephone records available for public purchase, the court found Accusearch "developed" those records and therefore was an information content provider under § 230.[90]

The court in *MCW, Inc v. Badbusinessbureau.com, L.L.C.*[91] reached a similar result where a consumer-complaint website asked a disgruntled consumer to, among other things, take specific photographs of the offending company's owner and post them on the website.[92] The court opined, "[t]he defendants cannot disclaim responsibility for disparaging material that they actively solicit."[93] The court further equated "actively encouraging and instructing a consumer to gather specific detailed information" to development of that information.[94]

More recently, however, a court resolved a similar issue differently.[95] *Whitney Information Network, Inc. v. Xcentric Ventures, L.L.C.*[96] concerned the same defendant consumer-complaint website as in *MCW*.[97] The *Whitney* court found that despite the fact the website advised its users make their reports more interesting by using creativity,[98] it differed from the solicitation at issue in *MCW* because here the website had not solicited *specific* content.[99] It is notable, however, that the *Whitney* court made a point of mentioning the website's

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86. *Id.* at 1149 (quoting 47 U.S.C. § 230(f)(3) (2006)).

87. *See* F.T.C. v. Accusearch, Inc., 570 F.3d 1187, 1199-1200 (10th Cir. 2009); MCW, Inc. v. Badbusinessbureau.com, L.L.C., No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at *10 (N.D. Tex. Apr. 19, 2004). *But see* Whitney Info. Network, Inc. v. Xcentric Ventures, L.L.C., No. 2:04-cv-47-FtM-34SPC, 2008 WL 450095, at *10, *11 n.27 (M.D. Fla. Feb. 15, 2008) (finding that despite plaintiff's assertions that defendants solicited user reports about companies that rip off consumers, defendant had not solicited *specific* material and therefore did not develop the content at issue).

88. 570 F.3d 1187.

89. *Id.* at 1201.

90. *Id.* at 1198.

91. 2004 WL 833595.

92. *Id.* at *10.

93. *Id.*

94. *Id.*

95. *See* Whitney Info. Network, Inc. v. Xcentric Ventures, L.L.C., No. 2:04-cv-47-FtM-34SPC, 2008 WL 450095, at *12 (M.D. Fla. Feb. 15, 2008).

96. *Id.*

97. *Compare id.* at *1, *with MCW*, 2004 WL 833595, at *1.

98. *Whitney*, 2008 WL 450095, at *5.

99. *Id.* at *11 n.27.

requirement that the poster attest to the validity of his report,[100] contrasting this with a hypothetical non-immune website which invited postings based on fabrication.[101]

C. Links

Some courts have held that providing links to information on other websites does not constitute development of that information. In *Universal Communication Systems, Inc. v. Lycos, Inc.*,[102] the First Circuit rejected the argument that an ISP "rendered culpable assistance" to a third party information content provider by providing a link to information that damaged the plaintiff.[103] The court held that defendant Lycos enjoyed § 230 immunity because the message board postings on the linked website remained the content of *another* information content provider, despite the fact that the "construct and operation" of Lycos's site—the links—may have influenced the availability of the postings.[104] The court noted that making it "marginally easier for others to develop and disseminate misinformation" is "not enough to overcome Section 230 immunity."[105]

D. Free-form Text Entries

Free-form text prompts serve as "blank slates" which users may "develop" in any way they like.[106] Two federal courts of appeals have held that a website's provision of free-form text boxes did not constitute creation or development of the content users post therein.[107] In *Fair Housing Council v. Roommates.com, L.L.C.*,[108] the Ninth Circuit found an "Additional Comments" section that provided an open text prompt where users could enter descriptions in their own words was not "creation" by the website.[109] The Seventh Circuit reached a similar result in *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*,[110] finding the website's offering of an advertising forum did not cause the discriminatory content of the advertisement any more than "people

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100. *Id.* at *5.

101. *Id.* at *10-11 (citing Fair Hous. Council v. Roommates.com, L.L.C., 489 F.3d 921, 928 (9th Cir. 2007)). The *Whitney* court declined to use this *Roommates.com* panel decision as authority prior to the case's rehearing by the Ninth Circuit en banc. *See id.* at *10 n.25.

102. 478 F.3d 413 (1st Cir. 2007).

103. *Id.* at 419-20.

104. *Id.* at 419.

105. *Id.* at 420.

106. Thanks to Professor Wright for this analogy.

107. Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 671 (7th Cir. 2008); Fair Hous. Council v. Roommates.com, L.L.C., 521 F.3d 1157, 1173-74 (9th Cir. 2008) (en banc).

108. 521 F.3d 1157.

109. *Id.* at 1173-74.

110. 519 F.3d at 671.

who save money 'cause' bank robber[ies]."[111]

E. Search Engine Results

Whether search engine results and sorting/matching mechanisms constitute creation or development is a subject of some debate.[112] In *Roommates.com*, the website allegedly violated the Fair Housing Act (FHA) by, among other things, employing prohibited characteristics such as sexual orientation and family status to sort and match users.[113] The *Roommates.com* dissent argued, "there should be a high bar to liability for organizing and searching third-party information."[114] The majority appeared to agree: "The mere fact that an interactive computer service 'classifies user characteristics . . . does not transform [it] into a "developer" of the "underlying misinformation."'"[115] To define "development" so broadly as to include the sorting of dating profiles according to the users' relationship preferences would "sap section 230 of all meaning."[116] However, the majority found that Roommate's[117] development of the "discriminatory search mechanism is directly related to the alleged illegality of the site"[118] and was, therefore, "sufficiently involved with the design and operation of [its] search and email systems . . . so as to forfeit any immunity to which it was otherwise entitled under section 230."[119] Though the *Roommates.com* court based its finding on the mechanism's ultimately discriminatory result, commentators have warned that even stricter liability for search engines may be on the horizon.[120] Although § 230 generally protects "pure" search engines, "recommendations of content potentially become endorsements of that content's message."[121] Further, when the search engine is part of a "creative community" or integrated with another application, the engine becomes identified with the content provider.[122] Conceivably, then, a sorting and matching mechanism used in conjunction with a website's commercial purpose could be considered creation or development of content.

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111. *Id.*

112. *See generally* James Grimmelmann, *Don't Censor Search*, 117 YALE L.J. POCKET PART 48 (2007), http://yalelawjournal.org/images/pdfs/582.pdf.

113. *Roommates.com*, 521 F.3d at 1172.

114. *Id.* at 1177 (McKeown, J., dissenting).

115. *Id.* at 1172 (majority opinion) (quoting Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003)).

116. *Id.* (discussing *Carafano*, 339 F.3d at 1124).

117. As the court notes, "for unknown reasons, the company goes by the singular name 'Roommate.com, L.L.C.' but pluralizes its website's URL, www.roommates.com." *Id.* at 1161 n.2.

118. *Id.* at 1172.

119. *Id.* at 1170.

120. *See, e.g.*, James Grimmelmann, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 36-37 (2007).

121. *Id.* at 37.

122. *Id.*

III. CASES INVOLVING PRE-POPULATED CONTENT

Recently, courts have confronted the application of § 230 to pre-populated content, particularly content selected by a user from choices provided by the website in a drop-down list.[123]

A. Roommates.com

In 2008, the Ninth Circuit Court of Appeals narrowed the broad grant of immunity set forth in *Zeran*.[124] In *Roommates.com*, the court found that § 230 did not shield the defendant website owner when its website matching room-seekers with room-renters required users to answer a questionnaire disclosing their sex, sexual orientation, and familial status.[125] The court found Roommate performed three specific acts of content "development," making it an information content provider and therefore not entitled to § 230 immunity.[126] First, Roommate authored the offensive questions.[127] Second, via drop-down lists, Roommate provided a limited choice of answers to those questions and required the user to answer the questions in order to use the service.[128] Third, Roommate used the answers in a search engine-like mechanism to sort and match users and create user profiles.[129]

The court provided two rationales for its holding.[130] First, the website "forced" users to answer a questionnaire by choosing from a drop-down list Roommate created.[131] Thus, "[b]y requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information."[132]

The court's second rationale focused on the nature of the information at

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123. *See Roommates.com*, 521 F.3d at 1166; Whitney Info. Network, Inc. v. Xcentric Ventures, L.L.C., No. 2:04-cv-47-FtM-34SPC, 2008 WL 450095, at *9 (M.D. Fla. Feb. 15, 2008).

124. *See Roommates.com*, 521 F.3d at 1170.

125. *Id.* at 1169-70.

126. *Id.* at 1164.

127. *Id.*

128. *Id.* at 1165.

129. *Id.* at 1167; *see supra* Part II.E.

130. *See Roommates.com*, 521 F.3d at 1165 ("The CDA does not grant immunity for inducing third parties to express illegal preferences. Roommate's own acts—posting the questionnaire and requiring answers to it—are entirely its doing and thus section 230 of the CDA does not apply to them.").

131. *Id.* at 1166. In characterizing how Roommate instructs its users, the majority's opinion uses the words "force" and "require" or variations thereof at least twelve times. *See, e.g.*, *id.* at 1166 n.19, 1167.

132. *Id.* at 1166.

issue.[133] The court held that "[§ 230] does not grant immunity for inducing third parties to express *illegal* preferences."[134] In finding no immunity for the site's profile and search mechanisms, the court stated that merely classifying user characteristics, as many websites do through their sorting and matching mechanisms, does not make a website a "developer" of information.[135] Rather, the court suggested that Roommate's mechanism received no immunity because it used "discriminatory questions" and "discriminatory answers" to encourage housing discrimination.[136] It is also notable that the court likened solicitation of content to development under § 230 but seemed to specify that the solicitation itself must be unlawful in order to develop unlawful content.[137] The Ninth Circuit attempted to draw a line, however, when it held user entries in Roommate's free-form text box were not "development" and, therefore, received § 230 immunity.[138]

The *Roommates.com* court stated "weak encouragement," such as requesting a descriptive entry in a free-form text box, "cannot strip a website of its section 230 immunity,"[139] but found § 230 does not protect a website that forces the expression of discriminatory preferences.[140] The court contrasted another website's "neutral tools" for matching users based on their voluntary selections with Roommate's website, which "is designed to force subscribers to divulge protected characteristics and discriminatory preferences" in order to match them based on characteristics prohibited by the FHA.[141] The *Roommates.com* majority also considered the *Universal* opinion, and distinguished it on the basis that *Universal* did not involve the website's "active participation" in developing the offensive content.[142] The Ninth Circuit did not address, however, the opinions' apparent differences as to making the offense "easier" to accomplish,[143] in light of the *Universal* court's finding that making it "marginally easier for others to develop and disseminate misinformation" is "not enough to overcome Section 230 immunity."[144]

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133. *Id.* at 1164. The court stated, "[W]e examine the scope of plaintiffs' substantive claims only insofar as necessary to determine whether section 230 immunity applies." *Id.* The court examined not whether the substantive claim was exempted from immunity under the statute, but rather whether the substantive claim had merit, in order to conclude § 230 immunity is inapplicable. *See id.*

134. *Id.* at 1165 (emphasis added).

135. *Id.* at 1172, 1174.

136. *See id.* at 1172.

137. *See id.* at 1166 ("Unlawful questions solicit (a.k.a. 'develop') unlawful answers.").

138. *Id.* at 1173-74.

139. *Id.* at 1174.

140. *Id.* at 1172.

141. *Id.*

142. *Id.* at 1172 n.33.

143. *Compare id.* at 1172, *with* Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 420 (1st Cir. 2007).

144. *Lycos*, 478 F.3d at 420.

B. Whitney

The court in *Whitney Information Network, Inc. v. Xcentric Ventures, L.L.C.* saw the drop-down issue somewhat differently.[145] In *Whitney*, the defendant website provided a forum for consumers to post complaints and other information about their dealings with various companies.[146] The website provided consumers with pre-populated drop-down lists and other mechanisms to describe the companies.[147] The *Whitney* court found the plaintiff company's defamation claim barred by § 230 because, absent evidence that the defendants participated in selecting the categories,

> the mere fact that [Defendant] provides categories from which a poster must make a selection in order to submit a report on the . . . website is not sufficient to treat Defendan[t] as [an] information content provider[] of the reports . . . that contain the "con artists", "corrupt companies", and "false TV advertisements" categories.[148]

The menu at issue in *Whitney* differed substantially from that in *Roommates.com* because it provided hundreds of choices to the user, many of which were not negative or defamatory in nature.[149] The *Whitney* court accordingly found the site's provision of a limited number of categories from which the user must select was not sufficient to constitute development because there were hundreds of categories and many were not defamatory.[150]

C. GW Equity

In *GW Equity, L.L.C. v. Xcentric Ventures, L.L.C.*,[151] the plaintiff claimed the defendant's consumer complaint website published comments which, among other things, defamed the plaintiff's business and interfered with the plaintiff's business relationships.[152] Whereas the *Whitney* court's opinion predated the Ninth Circuit's en banc holding in *Roommates.com*, the *GW Equity* court was able to consider the *Roommates.com* en banc decision.[153] The *GW Equity* court

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145. *See* Whitney Info. Network, Inc. v. Xcentric Ventures, L.L.C., No. 2:04-cv-47-FtM-34SPC, 2008 WL 450095, at *10-11 (M.D. Fla. Feb. 15, 2008).

146. *Id.* at *5.

147. *Id.*

148. *Id.* at *10.

149. *Id.* At the time of the *Whitney* decision, *Roommates.com* awaited rehearing by the Ninth Circuit en banc; the panel decision therefore had no precedential value. For this reason (in addition to the factual differences between the cases), the *Whitney* court refused the plaintiff's entreaty that it rely on the Ninth Circuit panel decision in *Roommates.com*. *See id.* at *10 n.25.

150. *Id.* at *10.

151. No. 3:07-CV-976-O, 2009 WL 62173 (N.D. Tex. Jan. 9, 2009).

152. *Id.* at *1.

153. *Id.* at *5.

found *Roommates.com* distinguishable on two counts.[154] First, Xcentric provided a broader range of selections to the user than did Roommate.com.[155] Second, unlike *GW Equity*, *Roommates.com* involved a situation in which the website violated the law simply by posing the wrong question, rather than through the answers it provided.[156]

D. Carafano

Content on the dating website Matchmaker.com was the subject of *Carafano v. Metrosplash.com, Inc.*[157] Matchmaker required date-seekers to complete a lengthy questionnaire.[158] Users selected answers to the questions from a series of drop-down menus listing between four and nineteen options, some of which were "innocuous" and some of which were "sexually suggestive."[159] Users were also asked to answer additional questions in an "essay" section.[160] The district court found that because the website, through its drop-down menus, created the content at issue, it was not eligible for § 230 immunity.[161] The Ninth Circuit reversed the district court's holding, reasoning that although "the questionnaire facilitated the expression of" users' information, "the selection of the content was left exclusively to the user."[162] Additionally, in contrasting the date-matching mechanism in *Carafano* with the roommate-matching mechanism in *Roommates.com*, the Ninth Circuit noted that the website-provided classifications in *Carafano* "did absolutely nothing to enhance the defamatory sting of the message, to encourage defamation or to make defamation *easier*."[163]

E. Craigslist

The plaintiffs in *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*,[164] brought a claim similar to that in *Roommates.com*, alleging that the defendant website was liable for violations of the FHA based on the housing-related postings of its users.[165] The content in *Craigslist* was not pre-populated, but it was like some of the *Roommates.com* and *Carafano* content in that it was formulated in response to "free-form" or essay prompts.[166] The court

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154. *Id.*

155. *Id.*

156. *Id.*; *see also infra* text accompanying notes 184-86.

157. *See*, 339 F.3d 1119, 1121 (9th Cir. 2003).

158. *Id.*

159. *Id.*

160. *Id.*

161. Carafano v. Metrosplash.com, Inc., 207 F. Supp. 2d 1055, 1067-68 (C.D. Cal. 2002).

162. *Carafano*, 339 F.3d at 1124.

163. Fair Hous. Council v. Roommates.com, L.L.C., 521 F.3d 1157, 1172 (9th Cir. 2008) (en banc) (emphasis added).

164. 519 F.3d 666 (7th Cir. 2008).

165. *Id.* at 668.

166. *See id.*

found this was insufficient to make the website a creator or developer of the offending content.[167] The court added, "[c]ausation in a statute such as [the FHA] must refer to causing a particular statement to be made, or perhaps the discriminatory content of a statement."[168] The court opined, "[n]othing in the service [C]raigslist offers induces anyone to post any particular listing or express a preference for discrimination."[169] Though not dispositive in its decision, the court noted that the plaintiff had many other potential defendants from which to recover.[170]

IV. DEFICIENCIES IN CURRENT JUDICIAL APPLICATIONS OF § 230

Courts have applied § 230 in website content cases in such a way as to create an amorphous and unworkable standard for judging creation or development of content. Such an ad hoc standard increases the risk that future decisions could erroneously reject a defendant's § 230 immunity defense in cases where the defense is warranted. Pre-populated content presents special challenges for courts because the question of whether the website "created or developed" the content ultimately selected by the user is not easily resolved.[171] When the website creates its drop-down interface, it authors every selection that appears in the list,[172] but the user actually produces the ultimate content by selecting an option from the list. This dichotomy yields the courts' dilemma. The problem is particularly notable after the *Roommates.com* decision that set an example for courts to look to the merits of the plaintiff's claim whenever the court finds it advisable to protect social goals in conflict with the § 230 statutory language. Although some of these goals may be worthy of protection, the courts are not the proper venue for doing so.

A. The Ambiguous Language of Creation or Development

Website creation or development of content depends upon whether the website "is *responsible*, in whole or in part, for the creation or development of information."[173] If courts could easily measure responsibility, defining creation

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167. *Id.* at 672.

168. *Id.* at 671.

169. *Id.*

170. *Id.* at 672.

171. *See, e.g.*, Fair Hous. Council v. Roommates.com, L.L.C., 521 F.3d 1157 (9th Cir. 2008) (en banc). In this case involving drop-down selections, the majority and dissent differed strongly on whether the user or the website "developed" the selected response. *Compare id.* at 1166 ("[B]y providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information."), *with id.* at 1182 (McKeown, J., dissenting in part) (noting that "providing a drop-down menu does not constitute 'creating' or 'developing' information").

172. *See, e.g.*, Webmonkey.com, Build an Ajax Dropdown Menu, http://www.webmonkey.com/tutorial/Build_an_Ajax_Dropdown_Menu (last visited May 24, 2009).

173. 47 U.S.C. § 230(f)(3) (2006) (emphasis added).

or development would be a relatively simple task. Unfortunately, responsibility is a matter of degree as well as perspective, and courts have not always focused clearly on this requirement.[174]

Courts have used multiple terms in discussing creation or development and have variously found that facilitating, weakly encouraging, classifying, and making development marginally easier do not constitute creation or development of content under § 230.[175] However, encouraging, actively encouraging, and instructing users to provide particular content may strip a website of immunity.[176] This confusion, apparent across decisions, is present even within decisions.[177] For example, in finding the defendant not protected by § 230, the *Roommates.com* court stated that the defendant did "much more than encourage . . . it forces users to answer certain questions."[178] Oddly, the court later stated that § 230 was properly applied in *Carafano* because the website in *Carafano* "did absolutely nothing to enhance the defamatory sting of the message, to encourage defamation or to make defamation easier."[179] Thus, the analysis aligns "forcing" content choice with making the choice "easier," and unfortunately, it does not provide much guidance as to what level of "encouragement" might be acceptable. The apparent explanation for this contradiction in the court's reasoning lies in its emphasis on the ultimately discriminatory result of Roommate's mechanism.[180]

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174. *See* MCW, Inc. v. Badbusinessbureau.com, L.L.C., No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at *10 n.12 (N.D. Tex. Apr. 19, 2004) (noting that the statutory language only requires a finding that defendant was responsible for information created or developed by a third party and that "[s]ome courts have ignored this distinction"); *see also* F.T.C. v. Accusearch, Inc., 570 F.3d 1187, 1198-99 (10th Cir. 2009) (conflating the concepts of responsibility and liability by stating, "one is not 'responsible' for the development of offensive content if one's conduct was neutral with respect to the offensiveness of the content").

175. *See Roommates.com*, 521 F.3d at 1174 (declaring that "weak encouragement cannot strip a website of its section 230 immunity"); *id.* at 1172 (quoting Carafano v. Metrosplash.com, 339 F.3d 1119, 1124 (9th Cir. 2003)) (noting that mere classification of user-provided information does not constitute development of that information); Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 420 (1st Cir. 2007) (finding that making it "marginally easier for others to develop and disseminate misinformation" still falls within the immunity provided by § 230); *Carafano*, 339 F.3d at 1124 (finding that an online questionnaire facilitating user expression did not run afoul of § 230).

176. *See Roommates.com*, 521 F.3d at 1171-72 (distinguishing non-immune website from another website that did nothing to encourage the defamatory nature of its content); MCW, Inc. v. Badbusinessbureau.com, L.LC., No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at *10 (N.D. Tex. Apr. 19, 2004) (finding that "actively encouraging and instructing a consumer to gather specific detailed information is an activity that goes substantially beyond the traditional publisher's editorial role").

177. *See, e.g.*, *Roommates.com*, 521 F.3d at 1172.

178. *Id.* at 1166 n.19.

179. *Id.* at 1172.

180. *See id.* at 1169 ("Roommate designed its search and email systems to limit the listings available to subscribers based on sex, sexual orientation and presence of children.").

The *Roommates.com* court did, however, clearly equate content development with solicitation when it posited, "Unlawful questions solicit (a.k.a. 'develop') unlawful answers."[181] Again, the court focused on the merits of the underlying discrimination claim by basing its finding on the ultimate illegality of the content at issue.[182] Roommate was an information content provider with respect to the questions it authored and, as such, was barred from asserting immunity under § 230 as to the questions.[183] Unlike any other cases addressing the issue, the prompts, or the questions, were themselves arguably illegal.[184] The questions encouraged the nature of the answers in part because Roommate provided such limited selections in the drop-down boxes.[185] In that sense, then, the court's reasoning that Roommate may have at least partially created the answers and cannot claim immunity for them[186] seems sound. It does not necessarily follow that an answer to an FHA-violating question is also a violation of the FHA. As a result, *Roommates.com* is the reverse of other cases where the prompt itself is not illegal, but the result it encourages is.

The *Roommates.com* majority made an effort to resolve the apparent ambiguities in its opinion when it explained its interpretation of "development" under § 230 as "referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness."[187] This statement leaves no doubt that the court looked beyond the website's role as an information content provider and into the nature of the content itself when denying § 230 immunity. Whether in the context of fair housing, defamation, or any other possible website content claims, such an approach is ill-suited to a question of immunity.

B. Preserving the FHA's Aims by Amending § 230

Much of the § 230 commentary following the *Roommates.com* and *Craigslist* decisions has focused on the conflict between the statute and the FHA.[188] By concentrating so heavily on the fair housing aspect of the dilemma, the discourse

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181. *Id.* at 1166.

182. *Id.*

183. *Id.* at 1164 ("Roommate is undoubtedly the 'information content provider' as to the questions. . . ."); *accord id.* at 1177 n.5 (McKeown, J., dissenting).

184. *See id.* at 1164 (majority opinion).

185. *See id.* at 1165.

186. *Id.* at 1166.

187. *Id.* at 1167-68.

188. *See* Diane J. Klein & Charles Doskow, *Housingdiscrimination.com?: The Ninth Circuit (Mostly) Puts Out the Welcome Mat for Fair Housing Act Suits Against Roommate-Matching Websites*, 38 GOLDEN GATE U. L. REV. 329 (2008); Stephen Collins, Comment, *Saving Fair Housing on the Internet: The Case for Amending the Communications Decency Act*, 102 NW. U. L. REV. 1471 (2008); J. Andrew Crossett, Note, *Unfair Housing on the Internet: The Effect of the Communications Decency Act on the Fair Housing Act*, 73 MO. L. REV. 195 (2008); Kevin M. Wilemon, Note, *The Fair Housing Act, The Communications Decency Act, and the Right of Roommate Seekers to Discriminate Online*, 29 WASH. U. J.L. & POL'Y 375 (2009).

has lost sight of the importance of the issue in non-fair housing contexts. The FHA presents a unique conflict with § 230 and should be addressed independently of other § 230 issues.

The FHA makes it unlawful to discriminate in the sale or rental of dwellings on the basis of "race, color, religion, sex, familial status, or national origin."[189] However, through what is known as the "Mrs. Murphy" exemption,[190] the statute allows landlords or current tenants who will occupy the dwelling with the prospective renter to discriminate in selecting tenants.[191] Most people using websites like Roommates.com and Craigslist are in just this type of rental situation.[192] Although the Mrs. Murphy exemption allows a roommate-seeker to choose a roommate on any basis she desires, it does not provide an exemption from the statutory mandate making it unlawful to make, print, or publish housing advertisements expressing preferences based on protected characteristics including race, sex, and familial status.[193] This mandate "expressly creates publisher liability for those who disseminate discriminatory advertisements,"[194] such as newspapers and similar media.

Although § 230 explicitly refuses website immunity for the violation of federal criminal statutes and intellectual property law,[195] in its present form, the statute provides immunity to those who would publish discriminatory housing advertisements.[196] The *Roommates.com* court justified finding no § 230 immunity for Roommate by implying Congress provided only a limited scope of immunity in the statute.[197] The court cautioned, "[w]e must be careful not to exceed the scope of the immunity provided by Congress and thus give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability."[198] The Ninth Circuit held that because racial screening is prohibited when practiced in person, Congress could not have wanted to make it lawful online.[199]

By providing in § 230 that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,"[200] Congress clearly intended to provide immunity to Internet businesses whose counterparts in the print world would be

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189. 42 U.S.C. § 3604(a) (2006).

190. *See* Klein & Doskow, *supra* note 188, at 334 (citing 114 CONG. REC. 2495, 3345 (1968)).

191. § 3603(b)(2).

192. Klein & Doskow, *supra* note 188, at 341.

193. § 3604(c).

194. Klein & Doskow, *supra* note 188, at 335.

195. 47 U.S.C. § 230(e) (2006).

196. *See id.* § 230(c)(1).

197. *See* Hous. Council v. Roommates.com, L.L.C., 521 F.3d 1157, 1164 & n.15 (9th Cir. 2008) (en banc) (noting that "[t]he Communications Decency Act was not meant to create a lawless no-man's-land on the Internet").

198. *Id.* at 1164 n.15.

199. *Id.* at 1167.

200. § 230(c)(1).

liable.[201] Publishers, such as newspapers, are subject to liability for unlawful content in the print world.[202] As the Seventh Circuit acknowledged in *Craigslist*, "nothing in § 230's text or history suggests that Congress meant to immunize an ISP from liability under the Fair Housing Act. In fact, Congress did not even remotely contemplate discriminatory housing advertisements when it passed § 230."[203] Some have argued this was mere congressional oversight.[204] Judge Easterbrook, however, saw it differently:

> [T]he reason a legislature writes a general statute is to avoid any need to traipse through the United States Code and consider all potential sources of liability, one at a time. The question is not whether Congress gave any thought to the Fair Housing Act, but whether it excluded § 3604(c) from the reach of § 230(c)(1).[205]

The *Roommates.com* court argued that Congress could not have intended to exempt the Fair Housing Act from § 230's scope.[206] The court then implicitly acknowledged Congress's stated purposes of promoting "the continued development of the Internet" and preserving "the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation."[207] The court felt it necessary to argue against these statutory objectives by stating, "[t]he Internet is no longer a fragile new means of communication that could easily be smothered in the cradle by overzealous enforcement of laws and regulations applicable to brick-and-mortar businesses."[208] The result was to subtly re-write § 230 from the bench, presumably to protect the civil rights objectives of the FHA. These objectives include educating the public about the FHA's protections, eliminating "steering" of minorities away from housing in certain locations, and eliminating the exclusionary atmosphere created by discriminatory housing advertisements.[209] Undoubtedly, these objectives are worthy of protection and amending the statute to make the FHA a specified exception to the reach of § 230 immunity is the best way to accomplish this end.[210] Congress, rather than the courts, must rewrite the

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201. *See* Zeran v. Am. Online, Inc., 129 F.3d 327, 330-31 (4th Cir. 1997).

202. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 345-46 (1974) (finding a magazine publisher liable for an author's defamatory article).

203. Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 671 (7th Cir. 2008).

204. *See* Jennifer C. Chang, Note, *In Search of Fair Housing in Cyberspace: The Implications of the Communications Decency Act for Fair Housing on the Internet*, 55 STAN. L. REV. 969, 993 (2002).

205. *Craigslist*, 519 F.3d at 671.

206. Fair Hous. Council v. Roommates.com, L.L.C., 521 F.3d 1157, 1164 (9th Cir. 2008) (en banc).

207. 47 U.S.C. § 230(b)(1)-(2) (2006).

208. *Roommates.com*, 521 F.3d at 1164 n.15.

209. *See* Klein & Doskow, *supra* note 188, at 340-48.

210. *See* Collins, *supra* note 188, at 1495; *see also* James D. Shanahan, Note, *Rethinking the*

law.[211]

Regardless of how the issue is resolved in the FHA arena, drop-down lists, checkboxes, and the like will continue to have definite implications under § 230 as "creation or development of information"[212] in a variety of legal contexts, such as defamation, negligence, and freedom of speech.[213] Courts must have a mechanism to deal with creation or development of pre-populated content in these other contexts.

V. DEVISING A "CREATION OR DEVELOPMENT" STANDARD FOR PRE-POPULATED CONTENT

Although the broad, *Zeran*-based interpretation of § 230[214] may work well for most types of Internet content,[215] it falls short when applied to drop-down lists and other pre-populated content. In the case of pre-populated content, responsibility for creation or development of information is particularly difficult to discern because the website authored the choices available to the user. Website operators and courts alike need a reliable standard for assessing when a website providing pre-populated or otherwise limited content selections crosses the line into becoming an information content provider.

A. Potential Methods to Determine Website Liability for Pre-populated Content

Several possibilities exist for crafting a workable standard, ranging anywhere from absolute website immunity to strict liability for any pre-populated content a website offers. Each of these alternatives has both advantages and limitations.

1. Broad Immunity.—One liability scheme for pre-populated content would be to apply § 230 protection any time the third party user makes the ultimate content selection. This system would allow websites to "encourage" or "solicit" content without incurring liability, essentially eliminating liability for all content pre-populated by the website.

This solution has appeal because it reflects our physical, brick-and-mortar world sensibilities of individual responsibility and decisionmaking. For instance, taunting a person to jump into a water-filled trench does not make the taunter

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Communications Decency Act: Eliminating Statutory Protections of Discriminatory Housing Advertisements on the Internet, 60 FED. COMM. L.J. 135, 154 (2007).

211. U.S. CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

212. § 230(f)(3).

213. Amending § 230 to accommodate the FHA will have no effect on claims based on other causes of action such as defamation, negligence, or the violation of constitutional rights. *See, e.g.*, *supra* notes 64-66.

214. *See supra* notes 45-53 and accompanying text.

215. *See generally*, Ziniti, *supra* note 10 (describing the more interactive nature of the modern Internet and discussing the problems with applying the current liability system to it).

liable for the person's drowning if the person does indeed jump.[216] Further, such a clear solution provides a brightline rule that would be easy for courts to apply, and it provides certainty for the interactive computer services Congress sought to protect through § 230.

Allowing complete immunity for all "encouragement," however, fails to recognize that encouragement is a matter of degree. When the user is left with no choices but those provided by the website, and none of them are satisfactory, it is difficult to claim his selection is solely her responsibility. Although taunting a person to jump off a cliff would not produce liability, pushing her off the cliff would, and putting her in a position where he has no real choice but to jump very well might produce liability.[217] The willingness of the user seems to be a key ingredient; even *Carafano*, a decision that could be characterized as a high-water mark of § 230 immunity, required that the "third party *willingly* provide[] the essential published content" for the website to receive full immunity.[218]

Further, such sweeping immunity would leave many plaintiffs without recourse for their harms. The third party posters of information are often unknown to plaintiffs,[219] and those known are frequently judgment-proof.[220] The Seventh Circuit acknowledged this consideration in the § 230 context when it noted that the *Craigslist* defendant had many other identifiable "targets" from which to seek damages.[221]

In addition, immunity of this breadth does not square with the statutory language.[222] Section 230 provides that a computer service shall not be treated as the publisher of information "provided by *another* information content provider."[223] The language defines a website as an "information content provider" if the site creates or develops the information it provides.[224] Congress could have provided immunity for all website-created or developed information by either altering the definition of information content providers to exclude interactive computer services, or by providing that a computer service shall not be liable for information provided by *any* information content provider. If Congress had intended to immunize computer service providers in all instances, it would not have limited the content for which websites could claim immunity.

2. Make a Determination on the Merits of the Underlying Claim.—Before determining if § 230 immunity applies, the court could make a preliminary

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216. *See* Yania v. Bigan, 155 A.2d 343, 345 (Pa. 1959).

217. *See id.* at 346 (noting that a defendant has no duty to rescue unless the defendant placed the victim in a "perilous position").

218. Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003) (emphasis added).

219. *See* Patel, *supra* note 26, at 691.

220. *See, e.g.*, Doe v. GTE Corp., 347 F.3d 655, 656-57 (7th Cir. 2003).

221. Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 672 (7th Cir. 2008).

222. *See* 47 U.S.C. § 230(c)(1) (2006).

223. *Id.* (emphasis added).

224. *See id.* § 230(f)(3).

examination of the merits of the plaintiff's claim, refusing immunity for content that appears to be unlawful. The *Roommates.com* court's repeated focus on the discriminatory nature of the content indicates just such an examination.[225]

Courts adjudicating defamation claims against anonymous speakers frequently employ this type of approach.[226] Before subjecting an anonymous speaker to public exposure, courts require some preliminary demonstration, such as a prima facie showing, that the contested statement was defamatory.[227] The approach works well in the anonymous speaker context because of the need to balance the First Amendment rights of the speaker with the rights of others to be protected from defamation.

Requiring a plaintiff to make a preliminary showing on the merits in § 230 cases would contravene the purpose of immunity. As the Supreme Court has recognized, immunity entitles the possessor to avoid the action entirely; it means "immunity from suit."[228] Even the *Roommates.com* court acknowledged the aims of immunity include protecting defendants from both liability and from the expense of defending against claims.[229] Moreover, forcing a preliminary examination of the merits would put additional issues before the court, unnecessarily consuming precious time in an already overburdened system.

In addition, requiring assessment of the merits would also defeat one of the core purposes of § 230, that of "promot[ing] the continued development of the Internet."[230] As courts and others have recognized, even non-meritorious claims have the effect of chilling free expression.[231] A website forced to defend on the merits even before it can invoke statutory immunity is more likely to restrict the content options it offers users reducing the range of information on its site.[232] This scenario would be particularly troubling in the case of pre-populated content. As any casual Internet user can attest, drop-down boxes and similar interfaces have become ubiquitous online. It does not tax the imagination to conclude that these types of interfaces have been critical in the evolution of Internet commerce, as well as to the development of sorting and matching mechanisms, both of which comprise a large part of today's Internet

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225. *See* Fair Hous. Council v. Roommates.com, L.L.C., 521 F.3d 1157, 1164-68 (9th Cir. 2008) (en banc).

226. *See, e.g.*, Krinsky v. Doe 6, 72 Cal. Rptr. 3d 231, 245 (Ct. App. 2008).

227. *Id.*

228. *Cf.* Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 499-500 (1989) (noting that court decisions against a defendant's immunity are immediately appealable under the collateral order doctrine).

229. *Roommates.com*, 521 F.3d at 1174-75 ("We must keep firmly in mind that this is an immunity statute we are expounding . . . . [It] must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.").

230. *See* 47 U.S.C. § 230(b)(1) (2006).

231. *See* Barrett v. Rosenthal, 146 P.3d 510, 525 (Cal. 2006); *see also* Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 890 (2000).

232. *Cf.* Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997) ("The specter of tort liability in an area of such prolific speech would have an obvious chilling effect.").

functionality.[233]

3. Strict Liability for Pre-populated Content.—Another approach to the issue of responsibility for creation or development of content would be to construct a bright line rule, finding that all pre-populated content is the creation of the website, regardless of the user's selection process.

Finding the website strictly liable for pre-populated content has some intuitive appeal because the website is the author *in fact* of every selection it makes available in a drop-down list. It seems logical that if a website provides an array of choices, knowing the user must select one of them, the website is at least partly responsible for developing the final product. This approach makes more sense than basing immunity on ultimate lawfulness of the content because whether the ultimate selection is lawful or unlawful has nothing to do with the selection process itself. In determining whether a website is an information content provider and thus not protected by § 230, courts must examine the website's role in the creation or development of the content, not the content itself. To hold that the lawfulness of the content determines the website's role in its development is backwards.

Further, the congressional intent of § 230 arguably dovetails with a strict liability approach to pre-populated content. As the *Roommates.com* court correctly notes, a website need only develop the content "in part" to lose § 230 immunity.[234] Also, interpreting the statute to provide immunity *only* to computer services that screen or remove offensive content[235] means websites that do not screen risk nearly limitless liability, consistent with a strict liability approach.

Strict liability for pre-populated content has several pitfalls. First, it carries the risk of creating liability in cases where the situation clearly does not warrant it. For example, where a website asking a user for his date of birth provides a drop-down list of years and a minor user selects a year indicating he is an age of majority, the website could be liable for the fraudulent result. Strict liability could also result in unwarranted liability for dating websites like that in *Carafano*, where the user produced a defamatory result not because the drop-down options he selected were defamatory, but because he created a dating profile for a woman without her permission, and the profile completely

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233. *Cf.* Janie J. Heiss, Droplets Platform Brings GUIs to the Internet, Aug. 15, 2002, http://java.sun.com/features/2002/08/droplets.html (asserting that prior to the development of Apple-style GUIs, web-based applications were substantially less productive); The Linux Information Project, GUI Definition, *supra* note 17 (discussing the importance of GUIs in the development of browsers).

234. *Roommates.com*, 521 F.3d at 1165-66; *see also* § 230(f)(3); Glad, *supra* note 11, at 259-60.

235. *See Roommates.com*, 521 F.3d at 1163-64; *see also* Rachel Kurth, Note, *Striking a Balance Between Protecting Civil Rights and Free Speech on the Internet: The Fair Housing Act vs. The Communications Decency Act*, 25 CARDOZO ARTS & ENT. L.J. 805, 835-36 (2007) (positing that § 230 should be read to provide immunity for internet housing services only when those services have made good faith screening or blocking efforts against FHA violations).

mischaracterized her.[236] Even the *Roommates.com* court said *Carafano* reached the "unquestionably correct result" in holding defendant Matchmaker.com immune under § 230.[237]

Another difficulty with strict liability is that it eliminates the court's ability to examine the nuances presented by a particular piece of content in context. This risk is particularly evident in cases of defamation, where the ultimate determination of liability depends upon the truth of the statement at issue and whether a reasonable person would have believed it or understood it as exaggeration or hyperbole.[238] For instance, the term "prostitute" could be used to refer accurately to a person's profession or to simply characterize a person negatively. In the first case, the use may be appropriate and would not subject the speaker to liability.[239] In the second case, the characterization could easily be interpreted as defamatory.[240]

Further, Congress did not intend a strict liability approach to pre-populated content. Strict liability runs counter to the spirit of § 230, by creating liability for *restriction* of content. The statute expressly protects content-restrictive actions such as blocking and filtering.[241] For example, a website may employ drop-downs or check-boxes, as opposed to free-form text boxes, in order to keep the final product within the bounds of propriety. It hardly seems reasonable that such a website should be liable if the user manipulates the site's restrictions into an unlawful result.

In addition, Congress's inability to predict how the Internet would develop is precisely the reason to leave immunity intact; Congress explicitly designed § 230 "to promote the continued development of the Internet and other interactive computer services and other interactive media."[242] Drop-down lists and the like have undoubtedly improved the efficiency and convenience of Internet use and have become essential to today's Internet functionality. If courts apply strict liability to this technology, countless new and yet unseen developments may be stifled.

Lastly, the legislative history reveals that when Congress passed the Dot Kids

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236. *See* Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1121, 1124 (9th Cir. 2003).

237. *Roommates.com*, 521 F.3d at 1171. The court, however, expressly corrected its "unduly broad" suggestion in *Carafano* that the website "could never be liable because 'no [dating] profile has any content until a user actively creates it.'" *Id.* (quoting *Carafano*, 339 F.3d at 1124 (brackets in original)).

238. *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990); Batzel v. Smith, 333 F.3d 1018, 1031 n.17 (9th Cir. 2003); Lidsky, *supra* note 231, at 874-75 (2000).

239. *Cf.* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (discussing the defense of truth and extending it, in the case of statements about public officials, to include false statements made without "actual malice").

240. *Cf.* Neiman-Marcus v. Lait, 13 F.R.D. 311, 316 (S.D.N.Y. 1952) (holding that department store salesmen had a valid cause of action for defamation against book authors who had characterized them as "fairies").

241. 47 U.S.C. § 230(c) (2006).

242. *Id.* § 230(b)(1).

Implementation and Efficiency Act in 2002,[243] it explicitly affirmed the broad, *Zeran*-based interpretation of § 230 by stating that "[t]he courts have correctly interpreted section 230(c)" to protect against claims like those presented in *Zeran*.[244] If Congress has since changed its mind, it is more than capable of amending § 230 to narrow the scope of immunity. For instance, 2008 saw the introduction of legislation modifying the Fair Housing Act to allow the display of religious symbols, in an effort to nullify the effect of a Seventh Circuit decision upholding a condominium's prohibition of religious symbol displays in residents' doorways.[245] In fact, it was just this sort of effort that provided the impetus behind § 230.[246]

4. "Active Inducement" Test.—Two courts that favored liability for "encouraging" content also briefly referred to the concept of "inducement."[247] *Craigslist* noted "[n]othing in the service [C]raigslist offers *induces* anyone to post any particular listing or express a preference for discrimination."[248] *Roommates.com* also fleetingly mentioned the concept: "The CDA does not grant immunity for *inducing* third parties to express illegal preferences."[249] Although these courts did not expound on the idea, the *Universal*[250] court discussed whether "active inducement" of particular content might remove a website's blanket of § 230 immunity.[251] Notably, the Supreme Court recently applied this concept, which originated in patent law,[252] in the Internet copyright violation case

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243. Dot Kids Implementation and Efficiency Act of 2002, 47 U.S.C. § 941 (2006).

244. *See* H.R. REP. NO. 107-449, at 13 (2002), *reprinted in* 2002 U.S.C.C.A.N. 1741, 1749 ("The courts have correctly interpreted section 230(c), which was aimed at protecting against liability for such claims as negligence . . . ." (citations omitted)); *see also* Barrett v. Rosenthal, 146 P.3d 510, 523 (Cal. 2006); Collins, *supra* note 188, at 1489.

245. *See* Douglas Wertheimer, *Illinois, Then Florida, Is Texas Next?*, CHI. JEWISH STAR, Apr. 3, 2009, at 3, *available at* 2009 WLNR 7194045 (discussing, inter alia, the Freedom of Religious Expression in the Home Act of 2008, H.R. 6932, 110th Cong. (2008), that was designed in part to overturn *Bloch v. Frischholz*, 533 F.3d 562, 565 (7th Cir. 2008) (upholding dismissal of a condominium resident's claim of religious discrimination based on condominium association's rule prohibiting placement of any objects outside owners' doors, which included plaintiff's display of a mezuzah)).

246. *See* H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 10 ("One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.").

247. *See* Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 671 (7th Cir. 2008); Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1165 (9th Cir. 2008) (en banc).

248. *Craigslist*, 519 F.3d at 671 (emphasis added).

249. *Roommates.com*, 521 F.3d at 1165 (emphasis added).

250. Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413 (1st Cir. 2007).

251. *See id.* at 421.

252. *See* 35 U.S.C. § 271(b) (2006) ("Whoever actively induces infringement of a patent shall be liable as an infringer.").

MGM Studios, Inc. v. Grokster, Ltd.[253]

In *Grokster*, the Court held a purveyor of online file-sharing software "who distributes [the software] with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties."[254] In examining the terminology, the Court noted that one induces infringement by enticing or persuading another to infringe.[255] The infringer must possess an affirmative intent that the product be used to infringe, which can be demonstrated when he advertises the infringing use or provides instruction on it.[256]

The *Universal* court applied the *Grokster* copyright inducement standard in the Internet defamation context.[257] The court found the defendant website, by providing a link to damaging information created by a third party, exhibited no "unlawful objective" in the construct of its website that would satisfy the requirement for inducement.[258] However, the court based its ultimate holding for the defendant on other grounds, noting that it was not clear that a claim premised on active inducement could be consistent with § 230.[259]

At least one commentator has attempted to craft an active inducement test to replace § 230.[260] Like the *Lycos* application of the concept, this version hews close to the original test, which asks whether the defendant induced the infringing or illegal use, by analyzing whether the website asked or induced the third party to provide unlawful content.[261]

An inducement test may be useful in the context of website liability for Internet content, but courts would have to adapt it to coexist with § 230. If applied as suggested to date, such a test would automatically force examination of the merits of the underlying claim by focusing on the legality of the content at issue. This type of premature examination of the merits guts the meaning of "immunity" and essentially renders § 230 inoperative.[262]

Instead, an inducement test could be used to clarify the meaning of "creation or development"[263] of content within the context of § 230. For instance, when assessing whether a website created particular content, a court could examine

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253. *See* 545 U.S. 913 (2005).

254. *Id.* at 919.

255. *Id.* at 935 (quoting BLACK'S LAW DICTIONARY 790 (8th ed. 2004)).

256. *Id.* at 936.

257. *See* Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 420-21 (1st Cir. 2007).

258. *Id.* at 421.

259. *Id.*

260. *See* Zac Locke, Comment, *Asking for It: A* Grokster*-based Approach to Internet Sites that Distribute Offensive Content*, 18 SETON HALL J. SPORTS & ENT. L. 151 (2008); *see also* Ziniti, *supra* note 10, at 608 (exploring and rejecting an "affirmative steps" standard on the basis that it would excessively chill speech).

261. *See* Locke, *supra* note 260, at 170.

262. *See supra* Part V.A.2.

263. 47 U.S.C. § 230(f)(3) (2006).

whether the website advertised for, demonstrated the use of, or profited from[264] that particular content, regardless of whether the content was lawful or not.

Inducement, with its established meaning in the patent and copyright contexts, would be a better test for whether a website created or developed content than *Roommates.com*'s nebulous "encouragement" standard.[265] When applied to pre-populated content, however, the inducement standard falls short. Due to the very nature of pre-populated content, it is in essence "advertised" by the website that developed it as a possible, if not "recommended" selection by the user. In that sense, all user-selected pre-populated content is "induced" by the website, leaving no § 230 protection for any content of this type.

B. The Solution: A "Safe Harbor"-style Rebuttable Presumption

Instead of applying an ill-fitting standard designed for another purpose, or resorting to extremes of either pure immunity or strict liability, determining responsibility for creation or development of pre-populated content demands a unique approach. Courts should develop a new standard, incorporating facets of the above suggestions, to provide protection for websites offering pre-populated content.

A "safe harbor" is an "area or means of protection," typically a statutory or regulatory provision "that affords protection from liability."[266] This proposal should not be confused with some commentators' proposed "notice-and-takedown" safe harbor modeled on the Digital Millennium Copyright Act (DMCA).[267] The DMCA allows Internet service providers to escape liability for copyright-infringing material posted by third-party users if the website has neither actual knowledge of infringement nor awareness of facts that make infringement apparent, and the website expeditiously removes the content upon notification of claimed infringement.[268] Notice-and-takedown liability, therefore, is quite similar to distributor liability.[269] Courts and commentators alike have rejected both types of knowledge-based liability in the context of § 230.[270]

The "safe harbor" concept is appropriate for pre-populated content because

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264. *See* MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 940 (2005) (recognizing defendant's revenue increased based on use of the software at issue, and noting this as supporting evidence for an inference of defendant's intent to promote that use).

265. *See* Fair Hous. Council v. Roommates.com, L.L.C., 521 F.3d 1157, 1171-72 (9th Cir. 2008) (en banc).

266. BLACK'S LAW DICTIONARY 1363 (8th ed. 2004).

267. *See* 17 U.S.C. § 512 (2006); *see also* Ziniti, *supra* note 10, at 603 n.121.

268. *See* § 512(c)(1).

269. *Cf.* Ziniti, *supra* note 10, at 601-04 (comparing the common law "knowledge" standard for distributors with the DCMA "knowledge" standard).

270. *See* Barrett v. Rosenthal, 146 P.3d 510, 514, 520 (Cal. 2006); Locke, *supra* note 260, at 160; Ziniti, *supra* note 10, at 604-05. *But see* Batzel v. Smith, 333 F.3d 1018, 1031 n.19 (9th Cir. 2003) (suggesting notice-and-takedown liability as a solution to the problems posed by the broad immunity conferred on ISPs by § 230).

the website is the actual author of pre-populated selections it offers. Because it is illogical to conclude a website is not responsible for creating or developing its own pre-populated content, a presumption of no immunity is proper. Such a presumption should be rebuttable, however, if the defendant can demonstrate that he meets certain provisions allowing § 230 immunity to be extended to the pre-populated content at issue. This approach would most logically be a regulatory undertaking,[271] perhaps under the auspices of the FCC. Some proponents advanced a regulatory approach in the legislation that eventually became § 230, but Congress rejected it for fear it would not effectively address the problem, would impede the growth of technology, and "threaten the future of the Internet."[272] Today, neither the FCC nor any other body comprehensively regulates the Internet.[273] Absent any regulatory framework for such a safe harbor, courts must create their own guidelines. As guidelines, none of the factors below should be dispositive, but courts should consider them all when analyzing liability for pre-populated content.

1. Number and Nature of Selections Available to the User.—The number of selections the website provides, and the general tone of the selections, are important indicators of whether particular answers are "forced" or "encouraged." The ultimate consideration here is the extent to which the user's power of choice is restricted. A limited number of selections, as in *Roommates.com*,[274] may indicate the user had little room to choose a suitable option, whereas a lengthy list of options, as in *Whitney*,[275] provides the user substantially more freedom. The answer to this question should be considered in light of the type of response requested. For example, if the prompt asks for the user to select a color, a limited listing of selections may be entirely appropriate. If, on the other hand, the prompt asks for a more descriptive or opinion-based answer, such as a feeling or characterization, then more options might be necessary. In addition, the nature of the offered selections should be considered. Where the options provided are all of the same general type, the user's power to choose is not a broad as it would be where a range of options is provided. For instance, if asked to characterize an experience, if the user is provided "positive" as well as "negative" selections, the options are less likely to "steer" the user to a particular outcome.

Another consideration in this context is precisely how the drop-down

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271. Thanks to Professor Wright for this suggestion.

272. *See* Chang, *supra* note 204, at 989 (citing 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox)).

273. *See generally* JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD (2d ed. 2008) (Though no universal regulation exists, nations use a patchwork of mechanisms in an attempt to exercise varying degrees of control over Internet activities within their borders.). Whether comprehensive Internet regulation is desirable or even possible is a matter of great debate and is beyond the scope of this Note.

274. *See* Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1165 (9th Cir. 2008) (en banc).

275. *See* Whitney Info. Network, Inc. v. Xcentric Ventures, L.L.C., No. 2:04-cv-47-FtM-34SPC, 2008 WL 450095, at *10 (M.D. Fla. Feb. 15, 2008).

selections are populated. In a static drop-down list, the website designer pre-populates the selections available to the user. A dynamic drop-down list works differently, in that the selections the user ultimately sees are dependent upon some other input, such as the user's selection in a prior list.[276] For instance, the first drop-down provides a list of states, and the second provides a list of the counties in the state selected from the first list. This type of configuration could weigh either for or against website responsibility for the content, depending on the situation. It might appear that if a user's selection results in a narrowing of her later selections, the user is more responsible for the later selections than the website is. However, when the website employs assumptions about user choices in configuring the second list, the reverse may be true. Imagine a web page where first box asks for a gender selection, and the second box, which asks for a color selection is designed by the website to list only pastels if the first selection is female and to list only bold colors if the first selection is male. In such an instance the website has narrowed the user's choices on the basis of a general sex-based assumption, and has undertaken a greater level of responsibility for the ultimate selection.

2. User's Ability to Forgo Making a Selection.—Whether a user can opt out of any particular selection may bear on the voluntariness of any selection she makes, particularly where the website provides a limited number of options to choose from. If the user must choose a response to every prompt, he may be forced to select a response with which he does not necessarily agree. Conversely, a mechanism such as an option of "no selection made" in a drop-down list, would allow a user to bypass a selection where he finds none of the website-provided options satisfactory. An alternative to allowing a user to make no selection may be for the website to provide an "other" category where the user is permitted to fill in a blank with her own language if none of the site-provided options is suitable.

When assessing the impact of whether the user can forgo making a selection, courts should consider how critical the particular prompt is to the overall purpose of the website. A website whose primary purpose is to match user profiles on the basis of sex is not likely to be useful to a user who refrains from specifying her sex. In this situation, the user who makes no sex selection is denied the very service he sought by using the website. In order to receive the value promised by the website, the user may be, in essence, forced to choose an unsatisfactory option. The same problem occurs if the user fills in her own response, if the website's sorting or matching mechanism is not capable of incorporating filled-in responses.

3. Commercial Purpose of a Particular Selection.—Where a website ties its revenue to users making particular choices, an inference that the website is responsible for those choices may be proper. If the user's selection of choice *A* over choice *B* has no bearing on the site's commercial success, the website has

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276. *See* Plus2Net.com, Dynamic Populating the Drop Down List Based on the Selected Value of First List, http://www.plus2net.com/php_tutorial/php_drop_down_list.php (last visited Oct. 30, 2009).

no financial incentive to encourage any particular choice. If, on the other hand, a website derives more income when the user chooses *A* over *B*, it is logical to conclude the site has a stake in the outcome of the user's selection and therefore encourages it. Such a connection may be tenuous, and courts should consider it only where there is other evidence to support website responsibility for the content choice.

4. No Conceivable Innocent Purpose.—If the website knows or reasonably should know the user has no legitimate use for the selections it provides, liability should naturally follow. The website could be compared to "the seller of sugar to a bootlegger, [who] must have known that the customer had no legitimate use for the service."[277] This corresponds to the "contributory infringement" theory of liability in patent law.[278] As with active inducement liability, the intent of the website should enter into the safe harbor analysis.[279] *Roommates.com* provides an example of a situation in which intent could be considered in the context of pre-populated content.[280] No conceivable innocent purpose might be demonstrated in a situation like that in *Roommates.com*, where the prospective landlord must disclose either "children present" or "children not present" when developing the rental listing.[281] When advertising rental housing, no innocent purpose exists for indicating familial status; the only conceivable purpose is to indicate a familial status-based preference or limitation in renting the dwelling, in violation of the FHA.[282]

5. Existence of Cautionary Instructions or Disclaimer.—A website that is serious about avoiding liability for unlawful content is likely to instruct its users on what type of content may be properly posted and will clearly indicate that all liability for violations resides with users. A website will strike a balance here between providing the proper cautions and keeping the website user-friendly. A lengthy and cumbersome process for user acceptance of the instructions is not preferable because users will be likely to abort the process. However, burying the cautions in fine print in the middle of a lengthy user agreement will likely not indicate a website's desire to reduce violations, and users will be inclined to simply click through the required screens without reading them. A short, non-exhaustive statement describing unlawful content and discussing liability,

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277. Doe v. GTE Corp., 347 F.3d 655, 659 (7th Cir. 2003).

278. *See* 35 U.S.C. § 271(d) (2006) (making a seller of a component of a patented machine liable for patent infringement if he knows the product is especially made for infringing use and is not capable of substantial noninfringing use); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 439-40 (1984).

279. *See* Recent Cases, *Internet Law—Communications Decency Act—Federal District Court Denies § 230 Immunity to Website that Solicits Illicit Content.*—FTC v. Accusearch, Inc., *No. 06-cv-105, 2007 WL 4356786 (D. Wyo. Sept. 28, 2007)*, 121 HARV. L. REV. 2246 (2008) (arguing for a mens rea-based exception to § 230 immunity).

280. Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1165 (9th Cir. 2008) (en banc).

281. *Id.*

282. 42 U.S.C. § 3604(c) (2006).

particularly if in bold font and requiring a separate acknowledgment, would serve the purpose without discouraging legitimate users.

Courts have contributed to the ambiguities surrounding creation or development of content under § 230, and courts have the capacity to clarify what they have wrought. The safe harbor-style rebuttable presumption provides courts with a practical mechanism to judge creation or development of pre-populated content, and provides guidance to websites in crafting their pre-populated content.

CONCLUSION

As the Internet has expanded, so have the content options available to websites and users. Because § 230 of the Communications Decency Act does not provide website immunity for content a website created or developed, pre-populated content poses particular problems for courts applying § 230. When a website provides a drop-down list of selections from which a user must choose, it is difficult to argue that the website did not create, at least in part, the ultimate content choice. To hold that websites are creators of pre-populated content, however, would strip them of § 230 immunity in situations where immunity is warranted. The unique nature of pre-populated content demands a novel approach by courts and requires consideration of multiple factors, many of which do not apply when considering other types of content. Only through crafting of such a multi-faceted approach will pre-populated content be offered the immunity Congress intended.

BREAKING THE LANGUAGE BARRIER: THE FAILURE OF THE OBJECTIVE THEORY TO PROMOTE FAIRNESS IN LANGUAGE-BARRIER CONTRACTING

LAUREN E. MILLER*

INTRODUCTION

> [E]stará estableciendo un contrato con Microsoft Corporation, One Microsoft Way, Redmond, WA 98052, Estados Unidos y la legislación del estado de Washington regula la interpretación de este contrato y se aplica a las demandas por su incumplimiento, independientemente de los principios de las normas de resolución de conflictos. . . . Ambas partes, usted y Microsoft, aceptan de manera irrevocable como jurisdicción exclusiva y foro competente a los tribunales estatales o federales del condado de King, Washington (EE. UU.) para resolver los conflictos derivados de este contrato o relativos al mismo.[1]

People who read the above passage might be frustrated that it is not in English. If an individual signed a contract that included this language, he might be even more frustrated to find out that only the state and federal courts of King County, Washington have jurisdiction over claims arising out of or related to the contract.[2] These frustrations are a reality for millions of U.S. residents who do not speak English but must sign contracts written exclusively in English.[3]

The objective theory of contracts states that a party's outward manifestations of assent will bind the party to the contract if the other party could reasonably

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1. Acuerdo de servicio de Microsoft. Última actualización: Mayo de 2009, http://help.live.com/help.aspx?project=tou&mkt=es-us (last visited Sept. 24, 2009), *translated in* Microsoft Service Agreement Last Updated: May 2009, http://help.live.com/help.aspx?project= tou&mkt=en-us (last visited Sept. 24, 2009) ("[Y]ou are contracting with Microsoft Corporation, One Microsoft Way, Redmond, WA 98052, United States, and Washington state law governs the interpretation of this contract and applies to claims for breach of it, regardless of conflict of laws principles. . . . You and we irrevocably consent to the exclusive jurisdiction and venue of the state or federal courts in King County, Washington, USA for all disputes arising out of or relating to this contract.").

2. Microsoft Service Agreement Last Updated: May 2009, *supra* note 1.

3. *See infra* text accompanying notes 165-76. In this Note, a language-barrier contract means a contract in which one party does not speak the contract's written language.

regard those manifestations as assent.[4] However, a party cannot reasonably regard outward manifestations as assent if he subjectively knows the party making those manifestations means otherwise.[5] Thus, courts apply the objective theory to reach decisions regarding the enforceability of contracts based on the circumstances present between the parties at the time of contracting.[6] Along this spectrum of outcomes, courts treat non-English speakers the same as people who speak English—they have a duty to read the contract.[7]

Courts refuse to recognize that holding non-English speakers to the duty-to-read standard is an unfair and outdated application of the objective theory.[8] The other party likely knows that the non-English speaker cannot read the contract; thus, the other party should not reasonably regard a non-English speaker's signature or affirmation as assent. Policy concerns about upholding efficiency and reliability in contracting, however, continue to dissuade courts from reevaluating the place of language-barrier contracts on the objective theory's spectrum of outcomes.[9]

This Note argues that alternative doctrines to the duty-to-read standard for language-barrier contracts would balance the policies of efficiency and reliability in contracting with more fairness. Specifically, these alternatives include applying the reasonable-expectations standard to language-barrier contracts, allowing a quasi-fraud defense, and holding non-English speakers to the lesser duty of using reasonable efforts to obtain translations of contracts before signing them. Part I of this Note provides background on the development of the objective theory and the policies that drove its development. Part II applies the objective theory to different contracting circumstances and describes the spectrum of outcomes. Part III discusses the current location of language-barrier contracts on that spectrum and argues that this position is wrong due to an outdated view of assent under the objective theory. Finally, Part IV concludes with a discussion of possible alternatives that would shift the location of

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4. RICHARD A. LORD, WILLISTON ON CONTRACTS § 4:19 (West 4th ed. 2009) (1920).

5. Wayne Barnes, *The Objective Theory of Contracts*, 76 U. CIN. L. REV. 1119, 1127 (2008).

6. 17A AM. JUR. 2D *Contracts* § 31 (2009).

7. *See* Paper Express, Ltd. v. Pfankuch Maschinen GmbH, 972 F.2d 753, 757 (7th Cir. 1992) ("[A] blind or illiterate party (or simply one unfamiliar with the contract language) who signs the contract without learning of its contents would be bound."); Shirazi v. Greyhound Corp., 401 P.2d 559, 562 (Mont. 1965) (holding that an Iranian citizen with limited English had a duty "to acquaint himself with the contents of the" contract); Paulink v. Am. Express Co., 163 N.E. 740, 741 (Mass. 1928) ("The plaintiff was bound by [the contract's] terms, in the absence of deceit on the part of the defendant, even though not understanding their purport and ignorant of the English language.").

8. *See infra* Part III.B.

9. *See* Morales v. Sun Constructors, Inc., 541 F.3d 218, 221 (3d Cir. 2008) ("The integrity of contracts demands that [the duty to read] be rigidly enforced by the courts.") (internal quotes omitted); *see also Paper Express*, 972 F.2d at 757 (indicating that the duty-to-read standard is appropriate in "a global economy [where] contracts between parties of different nationalities, and speaking different languages, are commonplace").

language-barrier contracts on the spectrum and argues that placing a duty on non-English speaking parties to use reasonable efforts to obtain contract translations is the best way to increase fairness in language-barrier contracting.

I. THE OBJECTIVE THEORY OF CONTRACTS

A basic principle of contract law states that "the formation of a contract requires . . . a manifestation of mutual assent to the exchange."[10] Since the late nineteenth century, courts have applied the objective theory to determine which manifestations amount to assent to form a contract.[11] Courts have continued to favor the objective theory over more subjective approaches of determining assent because they wish to uphold the theory's founding principles of reliability and freedom in contracting.[12]

A. Definition of the Objective Theory

Because the central purpose of the objective theory is to serve as the standard by which courts determine if two or more parties intended to and actually did form a contract,[13] principles of contract formation naturally serve as the background for the theory.[14] The most common way parties manifest their mutual intent to be bound is through the process of offer and acceptance.[15] In this process, parties make an outward manifestation of assent through either actions or words.[16] The clearest and most conventional way for a party to assent objectively to a contract is by signing it.[17]

After parties outwardly manifest their assent to contract, the objective theory governs whether their outward manifestations of assent are actually effective to form a binding contract.[18] Under the objective theory, a party's outward manifestation of assent is effective if the other party may justifiably regard it as assent.[19] If a reasonable contracting party would deem the other party's outward manifestation as assent to contract, in light of the surrounding circumstances, the

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10. RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981).

11. *See* Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 428-29 (2000).

12. *See* Barnes, *supra* note 5, at 1120.

13. 17A AM. JUR. 2D *Contracts* § 31 (2004).

14. *See* ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 4.12 (2008) (defining objective theory).

15. Edith R. Warkentine, *Beyond Unconscionability: The Case for Using "Knowing Assent" as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 475 (2008).

16. LORD, *supra* note 4, § 4:2.

17. Booker v. Robert Half Int'l, Inc., 315 F. Supp. 2d 94, 100 (D.D.C. 2004) ("'[A] signature on a contract indicates "mutuality of assent . . . ."'") (quoting Emeronye v. CACI Int'l, Inc., 141 F. Supp. 2d 82, 86 (D.D.C. 2001)).

18. *See* LORD, *supra* note 4, § 4:19 (describing what assent must entail under the objective theory in order to form a contract).

19. *Id.*

party receiving that manifestation is justified in regarding it as assent.[20] In describing the objective theory, Judge Learned Hand stated:

> A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.[21]

Judge Hand's example directly illustrates the objective theory's central premise—a party's internal, subjective intent does not matter; contract formation depends only on what he outwardly communicates.[22]

Although the subjective intent of a person manifesting assent to contract is not relevant in the objective theory, the personal knowledge of the party receiving that manifestation is important.[23] An offeror may regard an offeree's objective manifestations to mean what they reasonably appear to mean unless the offeror actually knows the offeree intends otherwise.[24] The personal knowledge of the party receiving another's manifestation of assent is the major factor that determines where on the spectrum of outcomes[25] the purported contract falls;[26] therefore, the effect of the offeror's personal knowledge is more fully explored in Part II of this Note.

Finally, the objective theory should be characterized as a tool courts use to evaluate the formation of a contract.[27] The objective theory is often the initial analysis a court engages in to determine whether a contract is enforceable, but it is hardly ever the only one.[28] In situations where the objective theory renders a contract enforceable, the party who objectively manifested assent may still raise defenses such as fraud, duress, mistake, and undue influence in an attempt to

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20. *Id.* § 4:2.

21. Hotchkiss v. Nat'l City Bank, 200 F. 287, 293 (S.D.N.Y. 1911).

22. *See* Barnes, *supra* note 5, at 1119-20.

23. *Id.* at 1125.

24. *Id.* at 1127.

25. The spectrum of outcomes is an array of holdings on the enforceability of contracts based on the application of the objective theory to the facts surrounding the formation of the contracts.

26. Barnes, *supra* note 5, at 1125 (noting that the modern objective theory takes into account the knowledge of someone in the position of "the actual recipient of the recipient of the manifestation" in determining the formation of a contract).

27. *Id.*

28. *See, e.g.*, Am. Heritage Life Ins. Co. v. Lang, 321 F.3d 533, 537-39 (5th Cir. 2003) (evaluating claims that defendant fraudulently induced plaintiff to sign an arbitration agreement and, alternatively, that the agreement lacked a "meeting of the minds"); Booker v. Robert Half Int'l, Inc., 315 F. Supp. 2d 94, 100-02 (D.D.C. 2004) (analyzing plaintiff's claims that an arbitration agreement lacked a "meeting of the minds" and was unconscionable).

invalidate the contract.[29]

B. Foundations of the Objective Theory

During the mid-nineteenth century, courts required that parties have a subjective "meeting of the minds" in order to contract.[30] The parties' actual intent determined their assent to an agreement and courts only analyzed outward manifestations as evidence of the parties' internal intent.[31] William Wentworth Story, a contracts scholar of the time, highlighted the prominence of a party's subjective intent in contract formation when he wrote, "[w]henever such intent can be distinctly ascertained, it will prevail, not only in cases where it is not fully and clearly expressed, but also, even where it contradicts the actual terms of the agreement."[32]

In the late nineteenth century, changes inside and outside the courtroom pushed judges to adopt an objective standard for analyzing the formation of a contract.[33] After evidentiary rules changed, allowing parties to testify on their own behalf, courts became sensitive to the fact that, ultimately, "the mind of a human is unknown and unknowable for the rest of the world," even when a party provides testimony of his intent.[34] Moving to an objective standard removed any incentive for parties to lie about their subjective intent under oath because their actual intent no longer determined the formation of the contract.[35]

The growth of big business and free enterprise in the late nineteenth century increased the desire for more reliability, predictability, and freedom in contracting, and the objective theory increased all three.[36] In the following illustration, Professor John Edward Murray, Jr. pointed out the reliance and economic problems caused by the subjective approach in the following illustration:

> If *A* makes an offer to which *B* manifests assent, may *A* later say, "I'm sorry, but we have no contract since I changed my mind a moment before

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29. LORD, *supra* note 4, § 3:4.

30. *Id.* § 4:1.

31. Barnes, *supra* note 5, at 1123.

32. Perillo, *supra* note 11, at 446 (quoting WILLIAM WENTWORTH STORY, A TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL § 231, at 149 (1972) (1844)).

33. *See id.* at 428-29.

34. Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1266 (1993) (citing MORTON HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 200 (1977)).

35. Perillo, *supra* note 11, at 457-63 (outlining the shift from a subjective theory after parties become allowed to testify because of courts' concerns that parties would be about their subjective intent).

36. *See* Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 629-31 (1943) (discussing the importance of freedom of contract and self-reliance as foundational principles in the development of contract law during the emergence of free enterprise systems).

> you announced your acceptance?" The possible hardship to one who had relied upon what had been expressed, only to discover that he had built his house of expectations upon the shifting sands of subjective intention, was unacceptable. Under that analysis, no system of contract law could ever prove workable since it would be impossible to prove the subjective intention of either party at any time.[37]

The objective theory fixes this reliability and certainty problem because it defines assent as objective manifestations instead of internal, unknown thoughts and desires.[38] If contractual liability is based on external manifestations, *A* may reasonably rely on *B*'s objective manifestation of assent to their contract and can continue to form other contracts that depend on the enforceability of his contract with *B*.[39] In this way, the objective theory increases security in business transactions.[40]

The objective theory also plays a role in furthering the principles of freedom of contract and private autonomy that serve as a basis for the Anglo-American common law contract system.[41] The objective theory requires that a party receive the other party's outward manifestation of assent before either party can be bound to the contract.[42] Without receiving the other party's manifestation of assent, a party could not justifiably or reasonably believe the other party assented to a contract.[43] In a system where only objective and received manifestations of assent effectuate a contract, a party can plan his business and personal affairs based on these manifestations without concern that he will be bound to other contracts to which he was unaware another party had assented.[44]

II. APPLICATION OF THE OBJECTIVE THEORY: CREATING THE SPECTRUM OF OUTCOMES

In applying the objective theory, courts reach different decisions on the enforceability of contracts based on the circumstances present between parties at the time of contracting.[45] Possible circumstances that affect the enforceability of a contract range from the age and mental capacity of a party to whether a party even read the contract before signing it.[46] When courts analyze these circumstances under the objective theory, the important aspect for contract enforceability is generally not the circumstances existing at the time of

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37. JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 30 (4th ed. 2001).
38. Barnes, *supra* note 5, at 1128.
39. *Id.*
40. *Id.* at 1128-29.
41. *Id.* at 1129.
42. LORD, *supra* note 4, § 4:1.
43. Barnes, *supra* note 5, at 1130.
44. *Id.* at 1130-31.
45. *See* 17A AM. JUR. 2D *Contracts* § 31 (2009).
46. *See* discussion *infra* Part II.A-F.

contracting but whether the parties were aware of those circumstances.[47] In the majority of cases, the subjective awareness of the party receiving an objective manifestation of assent factors into the court's analysis of whether a contract is enforceable.[48] In this way, the objective theory maintains contract enforceability based on external circumstances and the reasonable determinations of a party receiving a manifestation of assent to a contract.[49]

A. Minors

The general rule is that a contract where one party is a minor "is voidable and may be repudiated by the minor during minority or within a reasonable time upon achieving majority absent a ratification."[50] This rule follows the application of the objective theory to a minor's contract. If a minor outwardly manifests an intent to contract, the other party, who knows the minor is too young to contract according to law, would not reasonably be able to regard the minor's manifestations as assent under the objective theory.[51]

Often, however, courts also apply the general rule in situations where the minor has lied about his age to induce the other party to enter the contract.[52] When a minor credibly misrepresents his age, it would be reasonable for a party who receives the minor's outward manifestation of assent to regard that manifestation as valid assent.[53] However, such contracts are generally enforceable against adults, as expected under the objective theory, but are voidable by the minor because policy concerns about protecting minors from their own improvidence trump policies favoring the objective theory.[54] Thus, in the case of a minor lying about his or her age in order to contract, courts often

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47. LORD, *supra* note 4.

48. *See* discussion *infra* Part II.C-F.

49. *See* CORBIN, *supra* note 14 (indicating that the objective theory's merit stems from its "incorporating the knowledge and characteristics of the actual parties to the transaction").

50. Sheller *ex rel.* Sheller v. Frank's Nursery & Crafts, Inc., 957 F. Supp. 150, 153 (N.D. Ill. 1997) (quoting Iverson v. Scholl, Inc., 483 N.E.2d 893, 897 (Ill. App. Ct. 1985)) (internal quotations omitted).

51. *See* Barnes, *supra* note 5, at 1127 ("[P]romisees can take the manifestations of the promisor at face value for what such manifestations reasonably appear to mean, unless the promisee actually knows otherwise.").

52. Nicholas v. People, 973 P.2d 1213, 1219 (Colo. 1999) ("We expressly hold that a minor . . . may disaffirm any contract that he may have entered into during his minority, and this is equally true whether he has or has not misrepresented his age and even though his misrepresentation of age induced the other party to enter into the contract." (quoting Doenges-Long Motors v. Gillen, 328 P.2d 1077, 1080 (Colo. 1958) (emphasis omitted), *superseded by statute*, COLO. REV. STAT. ANN. § 19-2-511 (West 2005)).

53. *See* Barnes, *supra* note 5, at 1127.

54. *See, e.g.*, *Nicolas*, 973 P.2d at 1219 (arguing that public policy demands that minors be protected from "improvident and imprudent contractual commitments").

make an exception to the strict application of the objective theory.[55]

B. Mental Incompetence

A mentally incompetent person's contracts are generally voidable.[56] The Restatement states:

> A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect (a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or (b) he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition.[57]

Following the objective theory's notion that the personal knowledge of the party receiving a manifestation of assent is relevant, if an offeror has reason to know that an offeree is mentally incompetent at the time the offeree objectively manifests assent to a contract, the offeree may avoid the contract.[58]

Similar to the situation where a minor lies about his age in order to contract, if a party is not aware of the other party's mental incapacity at the time of contracting, a strict application of the objective theory would make the contract enforceable.[59] However, courts often balance the equities of ensuring predictability in the contracting system with protecting people with diminished mental competence from deception.[60] If the contract is made on fair terms and the offeror did not have knowledge of the mental defect of the offeree, the offeree's power of avoidance terminates to the extent that the contract has been performed or in circumstances where avoidance would be unjust.[61]

C. Intoxication

A person who executes a contract while intoxicated may later avoid the contract if the other party had reason to know that the intoxicated person could not understand or carry-out his contractual obligations due to his intoxicated

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55. *But cf.* LORD, *supra* note 4, § 9:22 (noting that some state statutes do not allow minors who misrepresent their age to later disaffirm their contracts on the basis of infancy).

56. *Id.* § 10:3 (noting that this is the majority view).

57. RESTATEMENT (SECOND) OF CONTRACTS § 15(1) (1981).

58. *E.g.*, Farnum v. Silvano, 540 N.E.2d 202, 205 (Mass. App. Ct. 1989) (holding that a vendor may avoid contract where she was not mentally competent at time of signing and the purchaser was aware of her mental disability).

59. The other party could reasonably regard the mentally incompetent party's objective manifestations as assent because the other party did not know that the mentally incompetent party lacked the capacity to contract at the time of contracting. *See* Barnes, *supra* note 5, at 1127.

60. *See* Knighten v. Davis, 358 So. 2d 1022, 1025 (Ala. 1978) (applying "general equitable principle which requires restoration of the consideration received upon cancellation of a deed for the incompetency of the grantor").

61. RESTATEMENT (SECOND) OF CONTRACTS § 15(2) (1981).

state.[62] Thus, applying the objective theory, a person cannot reasonably regard as assent an objective manifestation received from a party who is clearly intoxicated or known to be a chronic alcoholic or drug abuser.[63] On the other hand, if the offeror was not aware of the offeree's intoxication at the time of contracting, the offeree generally does not have the power of avoidance.[64] This outcome is a strict application of the objective theory because the offeror's reasonable interpretation of the offeree's manifestation of assent at the time of contracting determines the enforceability of the contract.[65]

D. Joke

Joking situations also give rise to a strict application of the objective theory.[66] Where one party was simply joking when he made an objective manifestation of assent, his contract is generally still enforceable under the objective theory if the other party had no reason to know of the joke.[67] *Lucy v. Zehmer* demonstrates this point.[68] Lucy offered Zehmer $50,000 for his farm, and Zehmer and his wife wrote and signed a document of transfer.[69] Zehmer later claimed they were joking about the transfer,[70] but the court found in favor of Lucy.[71] The court concluded that Zehmer's manifestation of assent through his document of transfer was reasonable under the circumstances, and that Lucy had no way of knowing Zehmer was joking.[72] Alternatively, if a party's manifestation of assent objectively indicates that he is joking so that the other party would reasonably know of the joke, the objective theory renders the contract unenforceable.[73]

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62. *Id.* § 16; *see also* Williamson v. Matthews, 379 So. 2d. 1245, 1248 (Ala. 1980) (setting aside sale of property when seller met burden of showing she was intoxicated during execution of contract).

63. *E.g.*, Kendall v. Ewert, 259 U.S. 139, 148-49 (1922) (voiding a deed signed by a habitual drunkard after the drunkard died and could not avoid it himself).

64. LORD, *supra* note 4, § 10:11.

65. Professor Wayne Barnes explains that the "gist of the objective theory of contracts" is that "promisees can take the manifestations of the promisor at face value for what such manifestations reasonably appear to mean, unless the promisee actually knows otherwise." Barnes, *supra* note 5, at 1127. When the promisee knows the promisor is intoxicated, he "actually knows otherwise," so a strict application of the objective theory means the contract is unenforceable.

66. *Id.* at 1125.

67. *See* Lucy v. Zehmer, 84 S.E.2d 516, 520-22 (Va. 1954).

68. *Id.*

69. *Id.* at 517-18.

70. *Id.*

71. *Id.* at 522-23.

72. *Id.* at 521.

73. *See* Leonard v. PepsiCo, Inc., 88 F. Supp. 2d 116, 127-30 (S.D.N.Y. 1999) (holding that no reasonable person would perceive an offer in a commercial to convey a Harrier jet in exchange for Pepsi points as a genuine manifestation of assent to form a contract).

E. Illiterate

An illiterate party is bound to a contract if he objectively manifests assent to it, usually by signing.[74] Courts have imposed a duty on the illiterate party to ask someone to read and explain the contract to him before signing.[75] If the illiterate party fails to have someone read the contract to him and he signs it, courts find him negligent.[76] This rule generally applies whether the other party knows of the illiteracy or not.[77] Thus, when one party to an agreement is illiterate, courts strictly apply the objective theory and deem the illiterate party's signature as a reasonable manifestation of assent, in the absence of fraud, even if the other party knows of his illiteracy.[78] As previously noted, however, an illiterate party who signs a contract may still raise any applicable contract defense in an attempt to invalidate the contract.[79] For example, if the other party is aware of the party's illiteracy and fraudulently induces or takes advantage of it, the illiterate party will not be bound.[80]

F. Duty to Read

Courts impose a "duty to read" on parties to a contract, so the parties are bound even if they do not read a contract before objectively manifesting assent to it.[81] Generally, "[i]t will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained."[82] Similar to the illiteracy context, courts applying the objective theory strictly regard an offeree's signature as a

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74. Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 242 (2002).

75. Miner v. Farm Bureau Mut. Ins. Co., 841 P.2d 1093, 1102 (Kan. Ct. App. 1992) ("Even where a contracting party is unable to read, the party is under a duty to have a reliable person read and explain the contract to them before signing it." (citation omitted)).

76. *See, e.g.*, Sutherland v. Sutherland, 358 P.2d 776, 785 (Kan. 1961) ("If a person cannot read an instrument, it is as much his duty to procure some reliable person to read and explain it, before he signs it, as it would be to read it before he signed it if he were able to do so, and his failure to obtain a reading and explanation of it is such gross negligence as will estop him from avoiding it on the ground that he was ignorant of its contents." (citation omitted)); Sponseller v. Kimball, 224 N.W. 359, 360 (Mich. 1929) ("If [a contracting party] cannot read, he should have a reliable person read it to him. His failure to do so is negligence which estops him from voiding the instrument on the ground that he was ignorant of its contents . . . .").

77. White & Mansfield, *supra* note 74, at 243.

78. *Id.*

79. *See* LORD, *supra* note 4, § 3:4.

80. Pimpinello v. Swift & Co., 170 N.E. 530, 531 (N.Y. 1930).

81. Jabour v. Calleja, 731 So. 2d 792, 795 (Fla. Dist. Ct. App. 1999) ("A party has a duty to learn and know the contents of an agreement before signing it." (citation omitted)).

82. Morales v. Sun Constructors, Inc., 541 F.3d 218, 221 (3d Cir. 2008) (citing Upton v. Tribilcock, 91 U.S. 45, 50 (1875)).

reasonable, objective manifestation of assent, even when the offeror knows that the offeree did not read the contract.[83] Further, in cases where acceptance is verbal or consists of some action other than signing, courts do not invalidate contracts for lack of mutual assent when a non-English speaking party did not read or understand the contract's terms before manifesting assent.[84] Again, the traditional contract defenses, especially fraud, are available to a party who did not read a contract before signing it.[85] In practice, proving a defense is the best way for a party who accepted a contract without reading it to invalidate the contract because courts rigidly enforce the duty to read standard under the notion that it is necessary to protect the "integrity of contracts."[86]

III. LANGUAGE BARRIER CONTRACT'S CURRENT PLACE ON THE SPECTRUM

For nearly a century, courts have held parties to the duty to read standard when they accept or sign contracts but are ignorant of the contract's written language.[87] For non-English speaking parties facing this standard in litigation, the only practical mechanism to avoid their contracts is to attempt to prove a contract defense, such as unconscionability or fraud.[88] What courts fail to realize when they apply the duty to read standard to language-barrier contracts is that their analyses are unfair and outdated applications of the objective theory based on the circumstances present at contracting.[89] This fact, combined with the reality that millions of residents in the United States are regularly parties to language-barrier contracts, highlights the need for a change in courts' analyses of language-barrier contracting.[90]

A. Current Location on the Spectrum: Duty to Read

The Supreme Judicial Court of Massachusetts adopted the duty to read standard early in the 1928 case, *Paulink v. American Express Co.*[91] Paulink, who did not speak or understand English, purchased traveler's checks from an

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83. Barnes, *supra* note 5, at 1152-53; *see* F.D. McKendall Lumber Co. v. Kalian, 425 A.2d 515, 518 (R.I. 1981) ("[A] party who signs an instrument manifests his assent to it and cannot later complain that he did not read the instrument or that he did not understand its contents.").

84. *See* Shirazi v. Greyhound Corp., 401 P.2d 559, 560 (Mont. 1965).

85. Warkentine, *supra* note 15, at 476.

86. LORD, *supra* note 4, § 4:19.

87. *See* Paper Express, Ltd. v. Pfankuch Maschinen GmbH, 972 F.2d 753, 757 (7th Cir. 1992); *Shirazi*, 401 P.2d at 562; Paulink v. Am. Express Co., 163 N.E. 740, 741 (Mass. 1928).

88. *See generally* Julian S. Lim, Comment, *Tongue-Tied in the Market: The Relevance of Contract Law to Racial-Language Minorities*, 91 CAL. L. REV. 579, 604-08 (2003) (analyzing the use of fraud and unconscionability to protect racial-language minorities in language-based contract disputes).

89. *See infra* text accompanying notes 125-43.

90. *See infra* text accompanying notes 165-76.

91. Paulink v. Am. Express Co., 163 N.E. 740, 741 (Mass. 1928).

American Express agent.[92] The checks, written in English, contained language outlining the conditions for their redemption.[93] When the checks turned out to be something other than what Paulink had intended to purchase, he sued to recover the money he paid for the unused traveler's checks.[94] The court refused to invalidate the transaction.[95] Applying the duty to read standard, the court held that Paulink "was bound by [the contract's] terms, in the absence of deceit on the part of the defendant, even though not understanding their purport and ignorant of the English language."[96] Regardless of his ability to understand the language of the contract, Paulink's purchase of the checks was a reasonable manifestation of assent.[97]

Nearly forty years later, the Supreme Court of Montana denied relief to a non-English speaker who accepted a contract he did not understand.[98] In *Shirazi v. Greyhound Corp.*, Shirazi was an Iranian citizen attending school in the United States who spoke approximately 400 English words.[99] After purchasing a ticket from Greyhound for a bus trip, Shirazi checked his luggage.[100] Printed in English on Shirazi's luggage receipt was a clause that limited Greyhound's liability for lost luggage to $25.[101] When Greyhound lost Shirazi's luggage, Shirazi sued for the total value of the lost items.[102] The court held that Shirazi had agreed to the liability limitation by accepting the receipt and that the notice on the receipt was reasonable.[103] Ultimately, the court did not accept Shirazi's argument that the contract should be void because he could not read the English terms.[104] The court strictly applied the duty to read and held that "[i]t was incumbent upon Mr. Shirazi, who knew of his own inability to read the English language, to acquaint himself with the contents of the [receipt]."[105]

The application of the duty to read to language-barrier contracts remains the standard in courts today.[106] In *Morales v. Sun Constructors, Inc.*, one of the most recent examples, the U.S. Court of Appeals for the Third Circuit purported to base its reasoning on the objective theory.[107] Morales, who only spoke and understood Spanish, signed an employment agreement, written in English, with

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92. *Id.* at 740-41.
93. *Id.* at 740.
94. *Id.*
95. *Id.*
96. *Id.* at 741 (citations omitted).
97. *See id.*
98. Shirazi v. Greyhound Corp., 401 P.2d 559, 562 (Mont. 1965).
99. *Id.* at 560.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 562.
104. *Id.*
105. *Id.*
106. *See* Morales v. Sun Constructors, Inc., 541 F.3d 218, 222 (3d Cir. 2008).
107. *Id.* at 221-23.

Sun Constructors, Inc.[108] Another Sun employee translated the document for Morales, but the employee failed to translate the arbitration clause.[109] After Morales's termination from Sun, he filed a wrongful termination suit, and Sun moved to stay the proceedings pending arbitration.[110] The district court held that Morales did not assent to the arbitration clause and denied Sun's motion, but the Third Circuit reversed.[111] The Third Circuit held that Morales had an "obligation to ensure he understood the [employment contract] before signing."[112] In declining to create an exception to the duty to read where a party is ignorant of the language of the contract, the court held that "[i]n the absence of fraud, the fact that an offeree cannot read, write, speak, or understand the English language is immaterial to whether an English-language agreement the offeree executes is enforceable."[113] Morales's signature was an objective and reasonable manifestation of assent regardless of whether Sun knew he did not speak English at the time of contracting.[114]

Because courts strictly apply the duty to read standard in the language-barrier context, parties who face a language barrier depend on contract defenses as a means to invalidate their contracts.[115] An important contract formation defense for non-English speaking parties is fraud.[116] To prove the other party fraudulently induced the non-English speaking party to sign the contract, these parties must generally show that their "manifestation of assent [was] induced by either a fraudulent or a material misrepresentation by the other party upon which [they were] justified in relying."[117] For example, if a non-English speaking party desires to open a money market account, a financial advisor tells him that the English documents he is signing relate to opening a money market account, but the documents are really security agreements, the non-English speaking party may argue fraud as a defense.[118]

Unconscionability is also a key defense for non-English speaking parties.[119] Unconscionability generally includes "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."[120] Thus, if a non-English speaking party desires to prove unconscionability, he must generally show both procedural and substantive

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108. *Id.* at 220.
109. *Id.*
110. *Id.* at 220-21.
111. *Id.* at 220.
112. *Id.* at 223.
113. *Id.* at 222.
114. *Id.* at 223.
115. *See* LORD, *supra* note 4, § 3:4.
116. *See id.* § 4:19.
117. RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981).
118. Cancanon v. Smith Barney, Harris, Upham & Co., 805 F.2d 998, 999 (11th Cir. 1986).
119. Lim, *supra* note 88, at 605.
120. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).

elements.[121] This defense is most successful for non-English speaking parties in the area of consumer and employment contracts because the unequal bargaining power inherent in those contracts "is merely aggravated by the fact that the weaker party cannot speak English."[122]

B. Problems with Current Location on the Spectrum

When adjudicating a contract dispute that involves a language barrier between parties, most courts find mutual assent between the parties to the contract and simply cite the principle that non-English speaking parties have a duty to read the contract as their analysis of the issue.[123] Courts see holding non-English speaking parties to the duty to read as a way to protect predictability and reliability in the contracting system because without this standard, "contracts would not be worth the paper on which they are written."[124] Courts need to take a closer look at the language barrier issue in contracting, however, because strong doctrinal and policy reasons exist for shifting the location of language-barrier contracts on the objective theory's spectrum of outcomes.

1. Doctrinal Reasons for Shift.—The most basic reason for shifting the location of language-barrier contracts on the spectrum is that when a court simply holds non-English speakers to a duty to read without further analyzing the facts of the case, the court overlooks the deeper analysis that highlights that this application of the objective theory is outdated.[125] In some cases, a more preferable, modern application of the objective theory might only affect the court's analysis of the case but does not change its outcome.[126] However, in the most basic language-barrier cases—where one party signing an agreement does not know the language and does not obtain a translation before signing—a court's failure to see a signature as anything other than a strict manifestation of assent under the objective theory leads to an unfair outcome in the case.[127]

What leads courts most often to miss the opportunity to redefine the customary objective theory analysis in language-barrier contract cases is that they automatically regard a non-English speaking party's signature or form of acceptance as a reasonable, objective manifestation of assent.[128] Realities of contracting in today's economy, however, provide compelling reasons to rethink this conclusion. Because nearly ninety-nine percent of contracts today are

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121. Lim, *supra* note 88, at 605-06.

122. *Id.* at 606.

123. *See* Holcomb v. TWR Express, Inc., 782 N.Y.S.2d 840, 841-42 (App. Div. 2004); Poplar Realty, LLC. v. Po, 778 N.Y.S.2d 832, 833-34 (App. Div. 2003).

124. Upton v. Tribilcock, 91 U.S. 45, 50 (1875).

125. *See infra* text accompanying notes 128-43.

126. *See infra* text accompanying notes 138-43.

127. *See infra* text accompanying notes 133-37.

128. Steven W. Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027, 1037 (1996).

standard form contracts,[129] the majority of contracts involving a non-English speaking party are likely form contracts as well. Professor Michael Meyerson, as well as other scholars, argue that a signature on a standard form contract is not a reasonable manifestation of assent; thus, the contract does not satisfy the objective theory.[130] Meyerson reasons that because the offeror who presents the form contract for signature often knows that the offeree did not read the contract before signing it, the offeror may not reasonably regard the offeree's signature as true assent to the terms in the contract.[131] Meyerson's argument follows the basic precept of the objective theory that if the offeror receives a manifestation of assent but is subjectively aware of something that affects the offeree's ability to truly assent to the contract, the offeror cannot reasonably regard the offeree's objective manifestation, in any form, as assent.[132]

In the language barrier context, finding a lack of assent on behalf of a non-English speaking party is easy using an application of Meyerson's view of assent. In *Paulink*, if Paulink was truly "ignorant of the English language,"[133] the American Express agent from whom Paulink purchased the traveler's checks would have been aware of this circumstance at the time of contracting.[134] Even though Paulink purchased the checks and accepted them,[135] a modern application of the objective theory holds that these objective manifestations of assent are not reasonable to the agent because of his knowledge that Paulink could not understand the agreement.[136] Without Paulink's assent, the contract is void for lack of mutual assent.[137] In *Paulink*, a fairer view of assent under the objective theory leads to a different outcome.

If the court in *Shirazi* had followed this modern analysis of assent under the objective theory, the outcome would have been the same, but the analysis would

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129. Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 431 (2002).

130. Meyerson, *supra* note 34, at 1265. *See generally* John D. Calamari, *Duty to Read—A Changing Concept*, 43 FORDHAM L. REV. 341, 351-55 (1974) (discussing the foundational cases holding that a signature is not an automatic manifestation of assent on standard form contracts).

131. Meyerson, *supra* note 34, at 1271.

132. *See* Barnes, *supra* note 5, at 1127 ("[P]romisees can take the manifestations of the promisor at face value for what such manifestations reasonably appear to mean, unless the promisee actually knows otherwise.").

133. Paulink v. Am. Express Co., 163 N.E. 740, 741 (Mass. 1928) (citation omitted).

134. *See id.* (indicating that oral communications between the parties likely occurred at the time of contracting).

135. *Id.* at 740.

136. The American Express agent could not reasonably deem Paulink's objective manifestations of purchasing and accepting the checks as assent because the agent knew of Paulink's inability to understand the English language at the time of contracting. *See* Barnes, *supra* note 5, at 1127.

137. *See* RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981) ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange . . . .").

have been different. Because the facts do not indicate that Shirazi spoke with anyone when he checked his luggage, Greyhound likely was not aware of Shirazi's inability to speak or understand English at the time of contracting.[138] Applying Meyerson's modern view of assent, however, this circumstance would lead the court to enforce the limited liability provision not because Shirazi had a duty to read the English on the receipt, but because Greyhound could reasonably regard Shirazi's acceptance of the luggage receipt as an objective manifestation of assent under the circumstances.[139]

Similarly, applying this updated objective theory analysis in *Morales* produces the same outcome with a different analysis. Morales's employer Sun knew Morales did not speak English when he signed the contract.[140] Typically in this situation, the modern analysis under the objective theory holds that Sun could not justifiably and reasonably believe Morales's signature indicated he understood and assented to the terms of the contract written in English.[141] The intervention of a translator, however, changes the analysis. Sun knew that Morales received a translation of the employment contract.[142] Sun had no way of discovering that the translation was faulty.[143] Therefore, from Sun's perspective, Morales knew, understood, and reasonably assented to the terms of the employment contract when he signed it. Following this preferable objective theory analysis, and not because Morales failed to fulfill his duty to read the contract, the contract is enforceable.

Courts must also reexamine their treatment of language-barrier contract cases because non-English speaking parties are often unsuccessful in the difficult task of proving traditional contract formation defenses.[144] Fraud is a difficult defense to prove because it generally requires a party to show "evidence of active or affirmative misrepresentation" on the part of the other party at the time of contracting.[145] The existence of a language barrier at contracting does not in itself constitute fraud; it only makes it easier for the other party fraudulently to induce the non-English speaking party to sign because he cannot verify the other party's representations with the contract's words.[146] Beyond these evidentiary hurdles to proving fraud, non-English speaking parties also have trouble proving this defense because some courts deny relief on the ground that it was

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138. *See generally* Shirazi v. Greyhound Corp., 401 P.2d 559, 562 (Mont. 1965).

139. The Greyhound employee could reasonably regard Shirazi's objective manifestation of accepting the luggage receipt as assent because the employee did not know that Shirazi could not understand English at the time of contracting. *See* Barnes, *supra* note 5, at 1127.

140. *See* Morales v. Sun Constructors, Inc., 541 F.3d 218, 220 (3d Cir. 2008).

141. *See* Barnes, *supra* note 5, at 1127.

142. *See Morales*, 541 F.3d at 220.

143. *See id.* (indicating that the Sun employee in charge of hiring, who did not speak or understand Spanish, explained the arbitration provisions of the employment contract and that Morales's translator spoke to Morales in Spanish throughout this explanation).

144. *See generally* Bender, *supra* note 128, at 1038-43.

145. Lim, *supra* note 88, at 605.

146. *Id.*

unreasonable for the non-English speaking party to rely on an oral statement which clearly contradicted the language in the written contract.[147] The practical effect of these rulings is that the non-English speaking party's inability to read and failure to obtain a translation of the written contract precludes his remedy for the other party's fraudulent statements.[148]

In analyzing an unconscionability defense, courts may highlight a language barrier as evidence of procedural unconscionability or unequal bargaining power that leaves the weaker, non-English speaking party with a lack of meaningful choice.[149] However, parties who face a language barrier still must be able to prove substantive unconscionability at the time of contracting in order to prevail in court.[150] Non-English speaking parties often find it difficult to prove substantive unconscionability because they generally desire to avoid their language-barrier contracts due to their lack of knowledge of an included term, not because the term is substantively unconscionable.[151] Also, because many non-English speakers neither realize they have a legal challenge to the enforcement of a contract nor have the financial means to litigate, unconscionability is a difficult defense to argue in attempting to overcome the duty to read.[152]

Even in situations where a non-English speaking party may be successful in proving unconscionability, the remedies available make the effort hardly worthwhile.[153] Generally, courts have not awarded punitive damages, tort remedies, or restitution to victims of unconscionable contracts.[154] For example, if a court finds a merchant's price unconscionable, courts typically limit the price to a fair amount but "will not require the merchant to return any overpayment."[155] This outcome provides little incentive for people who suspect they are victims of unconscionable conduct to seek a remedy in court, and it does not adequately deter merchants from continuing their unconscionable practices.[156]

2. Policy Reasons for Shifting.—The primary policy reason for shifting the location of the language barrier on the objective theory's spectrum of outcomes is that the basic principles behind the language barrier's current location are outdated. Courts developed the duty to read standard during the age of classical contract law when principles of individualism, liberty, and privacy prevailed.[157] The development of neoclassical contract law, which gave rise to more equitable

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147. Bender, *supra* note 128, at 1038-39.

148. *Id.* at 1039.

149. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981).

150. Warkentine, *supra* note 15, at 471-72.

151. *See* Morales v. Sun Constructors, Inc., 541 F.3d 218, 220 (3d Cir. 2008); Shirazi v. Greyhound Corp., 401 P.2d 559, 562 (Mont. 1965); Paulink v. Am. Express Co., 163 N.E. 740, 741 (Mass. 1928).

152. Warkentine, *supra* note 15, at 472.

153. Bender, *supra* note 128, at 1042.

154. *Id.*

155. *Id.*

156. *Id.*

157. *See* Kessler, *supra* note 36, at 630.

doctrines such as reliance and unconscionability, reintroduced values of trust, fairness, and cooperation as contract principles.[158] Under classical contract law, consideration and mutual assent were the sole defining characteristics of a contract.[159] Neoclassical contract law adds to the enforceability analysis social factors that influence whether the parties could have given clear and informed assent to the contract.[160] For example, courts adopted the doctrine of unconscionability to hold that in situations where mutual assent and consideration exist, the contract still may not be enforceable due to unequal bargaining power between the parties at the time of contracting or substantively unwarranted contract terms.[161]

Following the neoclassical trends in contract scholarship and adjudication, fairness needs to play a greater role in courts' decisions regarding what constitutes assent when a party to a contract does not speak or understand the contract's written language. Often the non-English speaking party is in a position of lesser bargaining power relative to the party presenting the English-language contract for signing, and the language barrier only exacerbates this feeling of inferiority.[162] If courts are willing to look at a party's "education or lack of it" as a social factor that could determine if he had the capability to understand the terms of a contract and thus truly consent to it, they also should take into consideration a party's ability to speak the language in which the contract is written.[163] Further, the duty to read and other unsympathetic doctrines give non-English speakers little faith in the fairness of the U.S. judicial system to the point that non-English speakers who recognize that they may have a legal claim regarding a contract do not pursue litigation.[164]

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158. Lim, *supra* note 88, at 592 (citation omitted).

159. *Id.*

160. *Id.* (citation omitted).

161. Bender, *supra* note 128, at 1040.

162. *See* Shirazi v. Greyhound Corp., 401 P.2d 559, 562 (Mont. 1965).

163. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449-50 (D.C. Cir. 1965). Here, the court held that the duty to read should be abandoned for victims of unconscionable contracts. *Id.* The court stated:

> Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.

Id.

164. Lim, *supra* note 88, at 602.

The potentially large number of contracts in America in which one party does not speak the language of the contract intensifies the need to shift the language barrier's location on the objective theory's spectrum of outcomes. The most recent census data estimates the legal permanent resident population in the United States at 12.1 million,[165] the nonimmigrant population at 3.8 million,[166] and the number of unauthorized immigrants at 11.8 million.[167] Typically, individuals in these categories live in communities with other immigrants and nonimmigrants of similar ethnicity or nationality.[168] Living and working in these culturally and linguistically homogeneous communities reduces the pressure on individuals to learn English.[169] Usually, three generations pass before family members primarily use English to communicate at home.[170] Census data supports this notion: 17.6% of the U.S. population over eighteen years of age that speaks a language other than English speaks English "not well"[171] and 8.4% of the same population speaks English "not at all."[172] Further, a higher percentage of the population than the census data reflects likely does not have basic English proficiency because household language serves as a barrier to the effective administration of census surveys.[173]

Finally, because contracting is at the core of business, the sheer number of immigrant-owned firms in the United States is also strong evidence for reevaluating the law's treatment of language-barrier contracts. Asians own

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165. NANCY RYTINA, DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE LEGAL PERMANENT RESIDENT POPULATION IN 2006 1 (2008) (Legal permanent resident "includes persons granted lawful permanent residence, e.g. 'green card' recipients, but not those who [have] become U.S. citizens.").

166. ELIZABETH M. GRIECO, DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE NONIMMIGRANT POPULATION IN THE UNITED STATES: 2004 1 (2006) ("A nonimmigrant is a foreign national seeking to enter the United States temporarily for a specific purpose.").

167. MICHAEL HOEFER ET AL., DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2007, at 1 (2008) ("The unauthorized resident population is the remainder or 'residual' after estimates of the legally resident foreign-born population—legal permanent resident (LPRs), asylees, refugees, and nonimmigrants—are subtracted from estimates of the total foreign-born population.").

168. Annick Germain, Immigrants and Cities: Does Neighborhood Matter? 2 (May 23, 2000) (unpublished presentation before the Transatlantic Learning Committee), *available at* http://im.metropolis.net/research-policy/research_content/doc/IMMIGRANTS.pdf.

169. *See id.* at 3.

170. Bender, *supra* note 128, at 1032.

171. U.S. CENSUS BUREAU, CENSUS 2000 PHC-T-37, ABILITY TO SPEAK ENGLISH BY LANGUAGE SPOKEN AT HOME: 2000.

172. *Id.*

173. PAUL SIEGEL ET AL., U.S. CENSUS BUREAU, LANGUAGE USE AND LINGUISTIC ISOLATION: HISTORICAL DATA AND METHODOLOGICAL ISSUES 1 (2001).

1,103,587 of the 22,974,655 business firms accounted for in the United States.[174] Hispanics or Latinos own even more at 1,573,464 firms.[175] These business owners sign standard English form contracts with vendors and suppliers on a regular basis, but they have little recourse in the courts when they discover that the form's language and their understanding or expectations concerning issues such as quality, packaging, and shipping do not coincide.[176]

IV. NEW LOCATION ON THE SPECTRUM FOR LANGUAGE-BARRIER CONTRACTS

The ultimate goal of shifting language-barrier contracts' location on the objective theory's spectrum of outcomes is to add more fairness to courts' analyses of whether a non-English speaking party should be bound to the English-only contracts he signs. Increased fairness comes in many different forms and can arise at different times in the contracting process.[177] Following trends in contract adjudication that work to balance fairness with the time-honored principles of reliability, predictability, and freedom of contracting,[178] this Note suggests three approaches to increasing fairness in language-barrier contracting that have a basis in the objective theory—the doctrine of reasonable expectations, a quasi-fraud defense, and the non-English speaking party's duty to use reasonable efforts to obtain a translation.[179] Although all three solutions have advantages and disadvantages, this Note argues that placing a duty on the non-English speaking party to use reasonable efforts to obtain a translation is the best solution because it most fully balances a fair outcome for non-English speaking parties with predictability and reliability in language-barrier contracting.

Before analyzing any viable solutions for where language-barrier contracts should fall on the spectrum, courts must note one more location, besides the duty to read, where these contracts should *not* fall. An application of the objective theory following Meyerson's modern definition of assent without regard for the unintended consequences of court outcomes on contracting in today's economy will not serve the interests of either party to language-barrier contracts.[180] For example, the modern objective theory analysis in *Paulink* resulted in the contract being void for lack of mutual assent.[181] This outcome injures the English

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174. U.S. CENSUS BUREAU, 2002 ECONOMIC CENSUS SURVEY OF BUSINESS OWNERS, 33 COMPANY SUMMARY: 2002 (2006).

175. *Id.* at 13.

176. Lim, *supra* note 88, at 588.

177. *See* discussion *infra* Part IV. (discussing the how the three solutions introduced in this Note increase fairness in language-barrier contracting).

178. See, e.g., Lim, *supra* note 88, at 605, for a discussion of unconscionability as "a fairly modern doctrinal development in contract law, typifying contract law's shift away from a classical theory of contracts based on freedom of contract and autonomy rationales."

179. *See* discussion *infra* Part IV.

180. *See infra* text accompanying notes 181-83.

181. *See supra* text accompanying notes 138-42.

speaking party in the short term because he cannot demand performance or win damages for non-performance of a void contract.[182] Simply adopting Meyerson's view of assent in a new objective theory analysis also injures non-English speakers' ability to contract in the future because the other parties would not view the contracts as certain or reliable.[183] The following three alternatives avoid these adverse consequences by increasing fairness in ways that also protect parties' ability and willingness to contract.

A. Doctrine of Reasonable Expectations

The doctrine of reasonable expectations holds that "[a]lthough [promisees] typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation."[184] Thus, a term is not part of a standard form contract unless it is one that the "uninitiated reader ought reasonably to have understood to be a part of that offer."[185] Courts primarily apply the doctrine in insurance cases to uphold applicants' and beneficiaries' objectively reasonable expectations about the terms of their policies, even though the policies do not actually contain those terms.[186] After the rise of standard form contracting, academic scholarship began advocating for the application of the doctrine in general contract disputes.[187]

Applying the doctrine of reasonable expectations to determine assent in language-barrier contracts benefits non-English speaking parties because it increases the standard for what the other parties to the contract may regard as objective, reasonable manifestations of assent.[188] Under the doctrine, a party presenting a non-English speaker with a standard form contract to sign is only able to regard the non-English speaker's signature as assent to contract terms of which he knows the non-English speaker is aware.[189] To help ensure the non-English speaker is aware of the terms, the other party will have an incentive to provide some form of translation of the agreement.[190] Therefore, applying the

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182. *See* LORD, *supra* note 4, § 1:20 ("A promise for breach of which the law neither gives a remedy nor otherwise recognizes a duty of performance by the promisor is . . . a void contract.").

183. *See generally* Kessler, *supra* note 36, at 630 (explaining that in a freedom of contract system, "[e]ither party is supposed to look out for his own interests and his own protection.").

184. Lim, *supra* note 88, at 613 (second alteration in original) (quoting Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 682 P.2d 388, 396 (Ariz. 1984)).

185. *Id.* at 614 (citations omitted).

186. Wayne R. Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227, 251 (2007).

187. *See* Warkentine, *supra* note 15, at 497 (listing the doctrine of reasonable expectations as one of the academic theories for determining the enforceability of standard form contracts).

188. For an explanation of how the doctrine of reasonable expectations raises this standard see Lim, *supra* note 88, at 614-15.

189. *Id.* at 615.

190. *Id.* at 616.

doctrine of reasonable expectations to language-barrier contracts increases fairness because non-English speaking parties will at least have the opportunity to read and understand the contracts they sign through a translation, and other parties will be less likely to include language to which they know a non-English speaking party, if he was truly aware of the term, would not agree.[191]

The same benefit the doctrine of reasonable expectations provides—creating an incentive for English speaking parties to provide translations of their agreements—is also its greatest flaw. If a party cannot enforce his contract with a non-English speaker unless he knows that the non-English speaker is aware of all the terms, he may choose not to contract with non-English speaking parties at all.[192] It is costly for a business to translate every standard form it uses,[193] especially if that business does not regularly contract with non-English speakers or contracts with a wide variety of language groups. Although large corporations may be able to afford translation services, many smaller, local companies cannot.[194] This circumstance reduces the number of businesses that are willing and able to provide goods and services to non-English speakers, which in turn raises the prices non-English speakers pay for those goods and services.[195] Although non-English speakers may find the contracting process fairer, they may not appreciate the effect of the doctrine of reasonable expectations on the cost of and access to goods and services in the marketplace.

The doctrine of reasonable expectations also loses persuasiveness as an alternative to the duty to read standard for language-barrier contracts because of the continued reluctance of legal bodies to promote its application outside the realm of insurance contracts.[196] Professor Robert Keeton first explained the doctrine and its application to the interpretation of insurance contracts in 1970.[197] After a short burst of experimentation with the doctrine, courts began limiting its application to or even outright abolishing its use in interpreting insurance contracts, citing fears of judicial meddling in contractual relations.[198] Now, as

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191. *See id.* at 615 (explaining how the doctrine of reasonable expectations can serve as a "powerful safeguard of the business interests of racial-language business owners").

192. *See generally* Kessler, *supra* note 36, at 630 (explaining that in a freedom of contract system, "[e]ither party is supposed to look out for his own interests and his own protection").

193. *See* Associated Press, *Interpreters Easing Patient Stress*, L.A. TIMES, Jan. 15, 2009, at B2 (reporting that an insurance carrier spent $500,000 to provide translation services for policyholders).

194. *See id.*

195. See ARLEEN J. HOAG & JOHN H. HOAG, INTRODUCTORY ECONOMICS 67-68 (4th ed. 2006) for a discussion of consequences in the market when supply changes. The cost of production is a determinant in supply. When the cost of production increases because suppliers must translate all their contracts, supply decreases. A decrease in supply means that a seller charges a higher price to produce the same amount of goods or services as before.

196. Warkentine, *supra* note 15, at 498.

197. Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970).

198. Jeffrey W. Stempel, *Unmet Expectations: Undue Restriction of the Reasonable*

courts are less inclined to apply the doctrine in the insurance context, very few courts advocate for the doctrine's expansion as an interpretation tool for other types of contracts.[199] Further, the American Law Institute (ALI) rejected a draft of subsection 211(3) which would have incorporated the doctrine of reasonable expectations into the Restatement.[200] Commentary suggests that ALI members changed the language in order to make the Restatement's position clearer and more appealing to courts.[201] Consequently, a court would not likely consider expanding the application of the retreating doctrine of reasonable expectations to the interpretation of assent in language-barrier contracts.

B. Quasi-fraud

Another option for increasing fairness in language-barrier contracting is to create a defense non-English speaking parties can raise and prove more easily than fraud or unconscionability. One example of such a defense, quasi-fraud, allows a non-English speaking party to avoid a contract if he can show that the other party was aware of the language barrier and took advantage of it in any way during the contracting process.[202] This defense is easier to prove than fraud because the non-English speaking party only needs to show that the other party took advantage of the language barrier in any way, not that he specifically made verbal misrepresentations on which the non-English speaking party relied.[203] Quasi-fraud is also easier to prove than unconscionability because the non-English speaker does not have to prove both a procedural and substantive element in order to be successful.[204] If the other party *either* took advantage of the language barrier to deny the non-English speaker a meaningful choice in the bargaining process *or* used the language barrier to bury substantively unconscionable terms in an English-only contract, the non-English speaking party would have a valid quasi-fraud defense.[205]

Contract law governing the validity of contracts between two parties in a fiduciary or confidential relationship serves as the basis for the creation of this new quasi-fraud defense.[206] A confidential or fiduciary relationship exists between parties "whenever one is in the position of advisor or counselor, and the other reasonably reposes confidence or trusts that person to act in good faith for

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Expectations Approach and the Misleading Mythology of Judicial Role, 5 CONN. INS. L.J. 181, 182-83 (1998).

199. Warkentine, *supra* note 15, at 498.

200. Barnes, *supra* note 186, at 251-52.

201. *Id.* at 252.

202. *See* Ellis v. Mullen, 238 S.E.2d 187, 189 (N.C. Ct. App. 1977) (applying a standard similar to quasi-fraud).

203. *See supra* text accompanying note 117.

204. *See supra* text accompanying notes 119-20.

205. *But cf.* Warkentine, *supra* note 15, at 471-72 (noting that a party seeking to prove unconscionability must show evidence of procedural and substantive unconscionability).

206. *See infra* text accompanying notes 207-12.

the latter's interest."[207] Generally, the non-advising party in "a confidential or fiduciary relationship" may invalidate a contract with the other party if he shows that the contract is not "fair, open, or honest."[208] One factor courts consider when determining if a contract is fair, open, and honest is whether the advising party "made a full and frank disclosure of all relevant information within his or her possession" before entering into the contract.[209] The policy reason behind this required disclosure is that the dominant party in the relationship automatically has superior information regarding the contract and courts want to ensure that he does not use this information to take unfair advantage of the weaker party during contracting.[210] The quasi-fraud defense does not create a fiduciary or confidential relationship between non-English speakers and every party with whom they contract in English.[211] The defense merely recognizes that many of the same circumstances exist in language-barrier contracting—i.e. a dominant party exists who has superior knowledge about the contract which is not readily available to the other party—and seeks to protect non-English speaking parties in a similar manner to ensure they are not exploited.[212]

The case of *Ellis v. Mullen* provides an example of how a court can apply the policies and principles of fiduciary and confidential relationship contracts to what is generally a duty to read analysis, thereby creating a defense for the weaker contracting party that resembles quasi-fraud.[213] In *Ellis*, Ellis sued Mullen seeking to recover $50,000 for personal injuries incurred in a car wreck between the parties.[214] Mullen's insurance company issued checks to Ellis totaling $900, which also stated that endorsement by Ellis satisfied all claims between the parties and released Mullen from liability.[215] Ellis signed the checks, but later sued to invalidate the checks claiming he was illiterate, did not have the checks read to him, and did not intend to release Mullen from liability.[216] The

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207. LORD, *supra* note 4, § 71:53.

208. 17A C.J.S. *Contracts* § 139 (2008).

209. *Id.*

210. *See id.*

211. See BLACK'S LAW DICTIONARY 1315 (8th ed. 2004), for an explanation of the four situations which give rise to fiduciary relationships:

> (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties . . . .

Id. None of these situations precisely describes the circumstances between the parties to a language-barrier contract.

212. *See* 17A C.J.S. *Contracts* § 139 (2008).

213. *See* Ellis v. Mullen, 238 S.E.2d 187, 189 (N.C. Ct. App. 1977).

214. *Id.* at 188.

215. *Id.*

216. *Id.*

court held that

> [t]he illiterate signer does not have to show fraud to attack the validity of the agreement. . . . Illiterate persons ignorant of the contents of contracts signed by them may be relieved of their obligations thereunder on proof of anything in the nature of overreaching or unfair advantage taken of their illiteracy.[217]

In allowing Ellis's claim to pass summary judgment, the court held that Mullen failed to establish that no issue of material fact existed whether he had taken unfair advantage of Ellis's illiteracy.[218] Because Mullen was aware of Ellis's illiteracy and used this information to his benefit in the contract between them without providing a full and frank disclosure of the contract terms, Ellis could raise a valid defense against the enforcement of the contract based on the theory that Mullen took advantage of his illiteracy.[219]

The defense of quasi-fraud adds fairness to language-barrier contracts in many of the same ways as the doctrine of reasonable expectations. If a non-English speaking party has a valid defense against contract enforcement because the other party did not fully disclose detrimental contract terms at the time of contracting, the other party will likely begin offering translations of its contracts in order to avoid facing this defense.[220] Creating this incentive to translate, however, may have the same unintended consequences as the doctrine of reasonable expectations,[221] which would negatively affect a non-English speaker's ability to contract at all.

Further, the quasi-fraud defense does not directly address the current problem of language-barrier contracts because it does not change a court's analysis of assent. Courts will still hold non-English speakers to a duty to read, and a signature on a contract will still be a reasonable, objective manifestation of assent.[222] The quasi-fraud defense only makes it easier for non-English speaking parties to later overcome the duty to read by showing that the other parties exploited their inability to read or understand English during the contracting process.[223] Without evidence of exploitation, courts will still enforce contracts the non-English speaking party accepted but did not read.[224]

Regardless of quasi-fraud's shortcomings, it does have one major advantage over the doctrine of reasonable expectations: because it is a defense, only non-English speaking parties will be able to use quasi-fraud in attempts to avoid a contract.[225] The other party will not be able to use quasi-fraud as a claim.[226]

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217. *Id.* at 189.
218. *Id.*
219. *See id.*
220. *See supra* text accompanying note 190.
221. *See supra* text accompanying notes 192-95.
222. *See supra* text accompanying notes 81-87.
223. *See* Ellis v. Mullen, 238 S.E.2d 187, 189 (N.C. Ct. App. 1977).
224. *See* Shirazi v. Greyhound Corp., 401 P.2d 559, 562 (Mont. 1965).
225. *See* BLACK'S LAW DICTIONARY, *supra* note 211, at 451 (noting that a defendant raises a

Because the doctrine of reasonable expectations redefines assent to a contract, either party may raise it in an attempt to avoid the contract for lack of mutual assent.[227] Therefore, the quasi-fraud defense makes the enforcement of language-barrier contracts more predictable for non-English speaking parties because only they have the power to avoid the contract in litigation for the reasons underlying the defense.[228]

C. Duty to Use Reasonable Efforts to Obtain a Translation

The final option proposed in this Note for increasing fairness in language-barrier contracting is to reduce the duty to read obligation on non-English speaking parties to a duty to use reasonable efforts to obtain a translation. Under this lesser duty, instead of considering non-English speaking parties negligent if they do not have the contract translated, courts would only find these parties negligent if they fail to use reasonable efforts to obtain a translation.[229] If a non-English speaking party signs a contract without attempting to obtain a translation, the contract is enforceable just like the contract of a person who can read English but does not read the terms before signing.[230] However, if a non-English speaking party signs a contract after attempting to obtain a translation and that translation turns out to be faulty, he can avoid the contract because he is not aware of the contract's terms through no fault of his own.[231]

Pimpinello v. Swift & Co.[232] provides a good example for how the duty to use reasonable efforts to obtain a translation would play out in litigation. In this case, Pimpinello sued Swift & Co. to collect damages for personal injuries suffered in an accident involving one of their trucks.[233] Pimpinello was not able to read or write English.[234] His attorney explained that the defendant had agreed to pay $750 on the claim up front and a larger amount to be determined later at trial.[235] Pimpinello signed a document believing it to be a receipt for the $750 payment, but the paper actually was a general release of all his claims against

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defense).

226. *See id.*

227. *See* Morales v. Sun Constructors, Inc., 541 F.3d 218, 222 (3d Cir. 2008) (rejecting a *claim* that parties did not form a valid contract due to a lack of mutual assent); Operating Eng'rs Pension Trust v. Cecil Backhoe Serv., Inc. 795 F.2d 1501, 1504-05 (9th Cir. 1986) (rejecting a *defense* that parties did not form a valid contract due to a lack of mutual assent).

228. *See* BLACK'S LAW DICTIONARY, *supra* note 211, at 451.

229. *See* Pimpinello v. Swift & Co., 170 N.E. 530, 531 (N.Y. 1930).

230. *See* Upton v. Tribilcock, 91 U.S. 45, 50 (1875); *see also* F.D. McKendall Lumber Co. v. Kalian, 425 A.2d 515, 518 (R.I. 1981).

231. *See Pimpinello*, 170 N.E. at 530-31.

232. *Id.* at 530.

233. *Id.*

234. *Id.*

235. *Id.*

Swift & Co.[236] In finding Pimpinello had a cause of action to void the release, the court held that "[i]f the signer is illiterate, or blind, or ignorant of the alien language of the writing, and the contents thereof are misread or misrepresented to him by the other party, or even by a stranger, unless the signer be negligent, the writing is void."[237] The court held that Pimpinello was not negligent in his duty to read the contract because he had his attorney do so.[238] Because his attorney misread the document to him, Pimpinello had a claim to void the contract.[239]

Applying the *Pimpinello* holding to language-barrier contract cases provides for a fairer outcome of the case from the perspective of the non-English speaking party. In *Morales*, if the court would have held Morales to the duty to use reasonable efforts to obtain a translation instead of the duty to read, the arbitration clause in Morales's employment contract would have been unenforceable.[240] Morales obtained a translation of the agreement before signing it, but, through no fault of Morales's, the translator neglected to translate the arbitration clause.[241] Therefore, Morales used reasonable efforts to obtain a translation, was not negligent in signing the agreement based on the representations of that translator, and should not be held to terms of which he was not aware due to the negligence of the translator.[242]

The duty to use reasonable efforts to obtain a translation also provides benefits to non-English speaking parties beyond fairer outcomes in language-barrier contract cases. The standard keeps the duty to read and understand the contract before signing on the non-English speaking parties; thus, the other parties to the contract do not risk an adverse ruling in court because they failed to translate the terms of the contract for the benefit of the non-English speaking party.[243] Keeping the burden to translate documents on non-English speaking parties prevents non-English speakers from bearing the negative consequences in the marketplace associated with shifting the burden to the other parties.[244]

Regardless of the increased fairness in language-barrier contracting associated with the duty of the non-English speaking party to use reasonable efforts to obtain a translation, the creation of the duty does have downsides. First, in a court's analysis of assent to a language-barrier contract, the duty would force the court to recognize an exception to the objective theory. Typically,

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236. *Id.*

237. *Id.* at 531.

238. *Id.* at 531-32.

239. *Id.*

240. *See infra* text accompanying notes 241-42.

241. Morales v. Sun Constructors, Inc. 541 F.3d 218, 224 (3d Cir. 2008) (Fuentes, J., dissenting).

242. This finding is an application of the duty of the non-English speaking party to use reasonable efforts to obtain a translation. *See supra* text accompanying notes 229-31.

243. *See supra* text accompanying notes 192-95.

244. *But see* Lim, *supra* note 88, at 616-18 (arguing that placing the duty to translate form contracts on the drafting party better serves contract goals of efficiency and fairness).

under the objective theory, a court would find it reasonable for an offeror to deem a non-English speaking party's signature to a contract as a manifestation of assent if the offeror was aware that the non-English speaking party obtained a translation before signing.[245] If the translation turned out to be faulty and the offeror was not aware of this circumstance at the time of contracting, the non-English speaking party's signature would still be a reasonable manifestation of assent.[246] Under the duty to use reasonable efforts to obtain a translation, however, if the translator failed to provide a correct translation of the agreement, the court would not hold the non-English speaking party to the terms of which he was not aware at signing.[247] Unlike the objective theory's analysis, the offeror's knowledge of the translator's mistake would not factor into the court's analysis of assent.[248] With the *Morales* court's unwillingness to create what it regarded as an exception to the objective theory for Morales's contract,[249] other courts adjudicating language-barrier contract cases might similarly decline to adopt a theory or doctrine which forces them to deviate from the traditional objective theory analysis.

Second, if the point of shifting the location of language-barrier contracts on the objective theory's spectrum of outcomes is to increase fairness in language-barrier contracting, the duty to use reasonable efforts to obtain a translation only increases fairness for non-English speaking parties at the expense of fairness to the other parties. Under the duty, the non-English speaking party is the only party with guaranteed access to the translator or translation.[250] Thus, the offeror does not have a way to check the accuracy of the translation prior to the completion of the contract, and he may not be able to enforce certain terms of the contract if the translation turns out to be incorrect.[251] Not only does the duty reduce fairness in the contracting process from the perspective of the drafter, but this level of insecurity about the enforceability of their agreements with non-English speaking parties also might push parties to avoid contracting with non-English speakers at all.[252]

Finally, the duty to use reasonable efforts to obtain a translation lacks definitiveness in some aspects that could affect a court's willingness to adopt it. The duty does not define how long a non-English speaker has to obtain a

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245. *See* Wilkisius v. Sheehan, 155 N.E. 5, 6 (Mass. 1927) (holding Lithuanians who could not read or understand English to their contract written in English even though their interpreter provided a faulty translation of the agreement).

246. *See* Barnes, *supra* note 5, at 1127.

247. *See supra* text accompanying notes 229-31.

248. *Compare supra* text accompanying note 23, *with supra* text accompanying note 231.

249. Morales v. Sun Constructors, Inc. 541 F.3d 218, 222 (3d Cir. 2008) ("Morales, in essence, requests that this Court create an exception to the objective theory of contract formation where a party is ignorant of the language in which a contract is written. We decline to do so.").

250. *See supra* text accompanying note 231.

251. *See supra* text accompanying note 231.

252. *See generally* Kessler, *supra* note 36, at 630 (explaining that in a freedom of contract system, "[e]ither party is supposed to look out for his own interests and his own protection").

translation.[253] Generally, the time frame for acceptance of an offer varies depending on the needs and desires of the parties.[254] Some contracts require nearly instantaneous acceptance.[255] Reasonably speaking, Shirazi could not have sought out a Persian translation of the luggage receipt before he accepted it due to factors such as the language's relative obscurity in the United States and the short time before he needed to catch his bus.[256] Also, non-English speakers, such as Morales, seeking to sign an employment contract may not have the bargaining power to request time to obtain a translation.[257] Many employment fields have a large supply of skilled laborers and immediate openings such that if one person cannot sign the contract and start work immediately, he may be passed over and the next person in line who does not require extra time to obtain a translation will get the job.[258] Therefore, the duty to use reasonable efforts to obtain a translation could force the non-English speaker to choose between either signing the contract without obtaining a translation, thus giving up the protection of the duty, or not getting the job. Further, the duty does not define what constitutes reasonable efforts to obtain a translation.[259] Many non-English speakers rely on family or friends who may not be completely fluent in English to serve as their translators.[260] If the duty requires official, certified translations, the cost to obtain these documents may place the protections of the duty financially out of reach of some non-English speakers.[261] They will be forced to sign contracts without translations, and the duty will cease to serve its protective function for non-English speaking parties.

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253. *See supra* text accompanying notes 229-31.

254. LORD, *supra* note 4, § 5:5 (explaining that the offeror is at liberty to determine the time frame for acceptance).

255. *See id.* § 5:7 ("A reasonable time for the acceptance of an offer made on a commercial exchange is within a few seconds . . . . A reasonable time for the acceptance of most offers made in face to face conversation or over the telephone will generally not extend beyond the time of the conversation . . . .").

256. *See* Shirazi v. Greyhound Corp., 401 P.2d 559, 560 (Mont. 1965). *But see id.* at 562 (holding that, even though it would be difficult, Shirazi had the duty to "acquaint himself with the contents of the ticket").

257. *See* Morales v. Sun Constructors, Inc. 541 F.3d 218, 220 (3d Cir. 2008) (noting Morales needed to sign the employment contract with Sun quickly because the company needed to start work immediately).

258. *See id.*

259. *See supra* text accompanying notes 229-31.

260. *See Morales*, 541 F.3d at 220 (noting Morales depended on an acquaintance who "generally understands about eighty-five percent of what is said and written in English" for interpretation of his employment contract); *see also* Trans-State Inv., Inc. v. Deive, 262 A.2d 119, 121 (D.C. 1970) (indicating party depended on an "interpreter-friend" to explain the contract to him in his native language before signing); People v. Kassim, 799 N.Y.S.2d 163 (Sup. Ct. 2004) (unpublished table decision) (indicating that the party takes friends along to interpret business documents).

261. *See* Associated Press, *supra* note 193.

D. The Best Solution: Duty to Use Reasonable Efforts to Obtain a Translation

Although the duty to use reasonable efforts to obtain a translation appears to have the most disadvantages of the three proposals for increased fairness in language-barrier contracting, the overall benefit of the duty—equitably placing non-English speakers in the same position as English speakers in contracting—greatly outweighs these disadvantages. For nearly a century, courts have simply assumed that English and non-English speaking parties are similarly situated at the time of contracting and thus should both be held to the duty to read.[262] Reality shows that this assumption is not correct. English speaking parties can choose to fulfill or ignore the duty to read at the time of signing a form contract written in English, but non-English speaking parties have no choice but to sign without reading. With the duty to use reasonable efforts to obtain a translation, the non-English speaking party gains the option to fulfill the duty or not.[263] Given time to obtain a translation of the contract before signing, the non-English speaking party has the same opportunity as an English speaking party to learn and understand the terms of the contract.[264] If he does not capitalize on this opportunity by obtaining a translation before signing, he loses the right to argue later that he should not be held to terms he was not aware were in the contract.[265] His situation is the same as the English speaker who does not take the time to read the contract before signing and who cannot later seek to avoid the contract based on the fact that he was ignorant of its terms.[266] Thus, the duty of the non-English speaking party to use reasonable efforts to obtain a translation finally converts the fiction into a reality that English speaking parties and non-English speaking parties have the same opportunities to understand their agreements at the time of contracting.

Further, the disadvantages of the duty to use reasonable expectations to obtain a translation are not cause for concern. Even though the creation of the duty would force courts to recognize an exception to the objective theory, the spectrum of outcomes shows that courts are willing to make exceptions to the objective theory when necessary to protect a party from exploitation in the

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262. *See supra* text accompanying note 87.

263. *See* Lim, *supra* note 88, at 616 (arguing that providing translations at the time of contracting also later places non-English speakers on the same footing as English speakers when they desire to check the contract terms for breach after unsatisfactory performance by the other party).

264. *See* Shirazi v. Greyhound Corp., 401 P.2d 559, 562 (Mont. 1965) (indicating that a translation would have allowed the non-English speaking party to understand the limited liability waiver).

265. *See* Upton v. Tribilcock, 91 U.S. 45, 50 (1875); F.D. McKendall Lumber Co. v. Kalian, 425 A.2d 515, 518 (R.I. 1981).

266. *See Upton*, 91 U.S. at 50; *McKendall Lumber*, 425 A.2d at 518.

contracting process.[267] Underlying courts' reasons for not strictly applying the objective theory in situations where a minor or mentally incompetent person contracts is that minors or mentally incompetent people are not fully able to understand the terms of the bargains they are accepting.[268] Similarly, non-English speaking parties are not able to understand the terms of their bargains when those bargains are written in English. Courts should place the protection of non-English speaking parties in contracting above forcing as many factual situations as possible into a strict objective theory analysis.

Second, although the duty to use reasonable efforts to obtain a translation may make contracting with non-English speaking parties less predictable for the English speakers in the transaction, reducing predictability to some extent is necessary in order to increase fairness in language-barrier contracting as a whole. Currently, the bargaining power in language-barrier contracting is entirely on the side of the English speaker who creates and presents the English language contract.[269] Not only is the drafter completely able to control the form of the contract at the time of contracting, he knows his allegedly unfair contract is generally safe in court because the court will hold the non-English speaking party to the duty to read standard.[270] The duty to use reasonable efforts to obtain a translation does not completely shift the bargaining power to the non-English speaking party. Instead, if the non-English speaking party fulfills the duty, it opens up the contracting process to actual bargaining between the parties because both parties have an opportunity to know, understand, and shape the terms of the agreement.[271] Although the question of whether bargaining is really possible when a party is presented with a standard form contract is outside the scope of this Note,[272] even increasing the possibility of bargaining in language-barrier contracting is an important step to increased fairness for non-English speaking parties.

Finally, the duty's indefiniteness about the time period to obtain a translation and the definition of "reasonable efforts" should not dissuade courts from adopting it. Language-barrier contracting arises in various factual situations—e.g., employment contracts and checked luggage receipts—which raises the argument that courts should simply define the duty on a case-by-case basis. For example, having a friend translate the small print on a checked luggage receipt may be reasonable, whereas having the same friend translate a lengthy and complex real estate investment contract may not be reasonable. Determining reasonableness based on the circumstances of the case is not a new idea in the

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267. *See* discussion *supra* Part II.A-B.

268. *See* discussion *supra* Part II.A-B.

269. *See* Kessler, *supra* note 36, at 632.

270. *See supra* text accompanying note 87.

271. *See supra* text accompanying notes 230-31.

272. For a discussion of bargaining in standard form contracting, see generally Kessler, *supra* note 36; Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983).

Anglo-American legal system.[273] The heart of the objective theory is determining what constitutes a reasonable manifestation of assent based on the circumstances present at the time of contracting.[274] Because courts are able to apply the duty with the same level of certainty as other established legal doctrines, courts should not deny non-English speaking parties the increased fairness in contracting resulting from the duty.

CONCLUSION

The objective theory of contracts is an important standard courts use to judge assent to a contract.[275] However, its application in the context of language-barrier contracts is outdated in light of the increased encounters non-English speaking parties have with English-only standard form contracts.[276] Over the last century, courts have applied doctrines and theories, such as unconscionability and the doctrine of reasonable expectations, that take into account the fairness of the bargain and the unequal knowledge of the parties in determining whether a contract is enforceable.[277] The time has come for courts to recognize that a bargain is not fair if one party does not understand the language of the contract.[278] New rules must replace the duty to read standard in adjudicating the enforceability of language-barrier contracts on the objective theory's spectrum of outcomes.

The doctrine of reasonable expectations, quasi-fraud, and the duty of the non-English speaking party to use reasonable efforts to obtain a translation are three possible ways for courts to balance efficiency and reliability in contracting with increased fairness for the protection of non-English speaking parties. All three possibilities have advantages and disadvantages, but the duty of the non-English speaking party to use reasonable efforts to obtain a translation most clearly places non-English speaking parties on equal footing with English speaking parties in contracting.[279] Most importantly though, all three solutions press the need for change in adjudicating language-barrier contracts and open the discussion for further analysis of ways to make contracting fairer for non-English speaking parties.

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273. *See* discussion *supra* Part I.A; *see also* RUSSELL L. WEAVER ET AL., TORTS: CASES, PROBLEMS, AND EXERCISES 103 (2d ed. 2005) (explaining that for the duty of care element of negligence, "most courts evaluate people based on their duty to act as a reasonably prudent person under the same or similar circumstances").

274. *See* discussion *supra* Part II.A-F.

275. *See* discussion *supra* Part I.A.

276. *See supra* text accompanying notes 165-76.

277. *See supra* text accompanying notes 119-22, 184-91.

278. *See supra* text accompanying note 269.

279. *See* discussion *supra* Part IV.

DEFINING DISPARATE TREATMENT UNDER THE PREGNANCY DISCRIMINATION ACT: *HALL V. NALCO CO.*, WHAT TO DO WHEN YOU ARE IN A CLASS OF YOUR OWN

E. ASHLEY PAYNTER*

INTRODUCTION

Imagine that a doctor diagnoses you with a medical condition that prevents you from accomplishing something that you have dreamed of your whole life. However, your doctor tells you that a medical procedure exists that could give you a twenty-five percent chance of achieving your dream. The procedure requires you to take a leave of absence from work. You collect your sick days and take a leave, but the procedure does not work. You chose to try one more time. After your employer approves your leave but a few days before it is supposed to begin, your employer informs you that it consolidated your position. Your employer tells you that because of your health problem it is in your best interest that you lose your job. This story is all too real for Cheryl Hall whose employer terminated her because she took time off to attempt to become pregnant through in-vitro fertilization (IVF).[1] Women across the country find themselves in similar positions as they try to balance concerns about maintaining their income with their efforts to create a biological child.[2] Recently, the Seventh Circuit Court of Appeals decided that employers of women who are undergoing IVF may not fire those women simply because of their IVF status under Title VII of the Civil Rights Act of 1964 as amended by the Pregnancy Discrimination Act (PDA).[3] What that actually means for women like Cheryl Hall is the subject of this Note.

Employee absenteeism related to IVF and other aggressive fertility treatment presents a new challenge to courts in determining whether employers have unlawfully discriminated against women. Current judicial application of the law attempts to provide women with legal equality in the workplace, but in enacting the PDA Congress did not intend mere attempts at equality.[4] This Note articulates why the current interpretation of the PDA is broken with regard to women in Hall's position and offers a possible judicial solution that favors

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1. *See* Hall v. Nalco Co., 534 F.3d 644, 645-46 (7th Cir. 2008).

2. *See* Frequently Asked Questions: Infertility, http://www.womenshealth.gov/faq/infertility.pdf (last visited Jan. 8, 2009) (noting that ten percent of women, or 6.1 million, between the ages of fifteen and forty-four who attempt to conceive have trouble doing so).

3. *See Hall*, 534 F.3d at 649.

4. *See* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 679 n.17 (1983) (discussing the legislative history of the PDA).

functionalism over legal formalism. Part I provides an overview of the PDA and its history and explains how the PDA is applied in litigation. Part II briefly explains IVF treatment and discusses the way federal courts have analyzed whether the PDA should protect IVF treatment. Part II also explains the Seventh Circuit's decision to extend the protection of the PDA to women who are undergoing IVF treatment. Part III explains why the courts' current definitions of disparate treatment in PDA cases is a problem for women who are undergoing IVF. Finally, Part IV offers a functional approach to defining disparate treatment in the IVF context.

I. THE PDA, ITS HISTORY, AND PREGNANCY DISCRIMINATION LITIGATION

Title VII provides that it is "an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."[5] Originally, the statutory language excluded sex from the list of protected characteristics.[6] Two days before the bill moved from the House to the Senate, House Representative Howard W. Smith proposed an amendment to include sex among the protected characteristics.[7] Congress had little time to debate the amendment, and the statute passed with the additional language, which left the courts with little legislative history to explain the addition.[8]

To flesh out the PDA and the jurisprudence surrounding it, it is helpful to consider how the courts interpreted the term "sex" for Title VII purposes prior to the PDA. An overview of the PDA's legislative history further clarifies the PDA's scope. Finally, an examination of key Supreme Court precedent and the disparate treatment standard that courts actually apply in the context of litigation round out the inquiry into the PDA's meaning.

A. The Judicial Construction of the Term "Sex" for the Purposes of Title VII Prior to the PDA

In 1972, the Equal Employment Opportunity Commission (EEOC)

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5. 42 U.S.C. § 2000e-2 (2006).

6. Thomas H. Barnard & Adrienne L. Rapp, *The Impact of the Pregnancy Discrimination Act on the Workplace—From a Legal and Social Perspective*, 36 U. MEM. L. REV. 93, 99 (2005).

7. *Id.* Representative Smith introduced the amendment in the hope that it would prevent the Civil Rights Act from passing, but the language came in and Title VII passed with the sex discrimination prohibitions intact. *See* Hillary Jo Baker, *No Good Deed Goes Unpunished: Protecting Gender Discrimination Named Plaintiffs from Employer Attacks*, 20 HASTINGS WOMEN'S L.J. 83, 89-90 (2009).

8. Barnard & Rapp, *supra* note 6, at 99-100 (quoting Willingham v. Macon Tel. Pub. Co., 507 F.2d 1084, 1091-92 (5th Cir. 1975)) (noting a judicial belief that Congress did not intend the proscription of discrimination on the basis of sex to have broad significance and that the court believed that a fundamental line needed to be drawn between distinctions based on fundamental rights, and the judgment an employer uses to run his business).

promulgated guidelines that included pregnancy in the definition of "sex" for the purposes of Title VII.[9] However, it was still legally hazy whether pregnancy-based discrimination was sex-based discrimination for the purposes of Title VII.[10] In *General Electric Co. v. Gilbert*,[11] the Supreme Court clarified the status of pregnancy-based discrimination under Title VII.[12] In *Gilbert*, female employees asserted that General Electric's disability plan, which paid weekly non-occupational sickness and accident benefits, unlawfully excluded pregnancy related disabilities from its coverage.[13] The Court held that because the plan covered exactly the same categories of disability for men and women it did not unlawfully discriminate under Title VII.[14]

The majority opinion drew vigorous dissents from Justices Brennan and Stevens.[15] Justice Brennan noted that the disposition of the case turned largely on the framework that the majority employed when it analyzed the operational features of the program.[16] Justice Brennan reasoned that although the program mutually covered all sex-neutral disabilities, it did not cover the exclusively female "disability" of pregnancy while including coverage for exclusively male disabilities.[17] Thus, if one focused on the risks that the plan did not cover, then it was obvious that the plan was discriminatory because it covered all risks except for those that were inextricably female.[18] Justice Stevens concluded that treating a risk of absence because of pregnancy differently than any other risk of absence was per se discrimination because only women experience pregnancy.[19]

B. The Passage of the PDA

In 1978, just two years after *Gilbert*, Congress amended Title VII to include pregnancy in the definition of sex.[20] It believed that the Court had made a mistake in *Gilbert*, and the PDA was Congress's attempt to return Title VII to what it believed to be the status quo.[21] Thus, the PDA creates no new rights or

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9. *Id.* at 100-01.
10. *Id.* at 101.
11. 429 U.S. 125 (1976), *superseded by statute*, 42 U.S.C. § 200e(k) (2006).
12. *See id.* at 127-28, 136.
13. *Id.* at 127-28.
14. *Id.* at 139-40.
15. *See id.* at 146, 160.
16. *Id.* at 147 (Brennan, J., dissenting).
17. *Id.* at 152.
18. *See id.* at 153 n.5.
19. *Id.* at 161-62 (Stevens, J., dissenting).
20. Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2006)); Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 670 (1983).
21. *See* H.R. REP. NO. 95-948, at 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4752 (noting that if the Supreme Court's interpretation of the definition of sex were allowed to stand Congress would yield to an "intolerable potential trend in employment practices"); *see also Newport News Shipbuilding & Dry Dock Co.*, 462 U.S. at 679 n.17 (noting the legislative history

remedies under Title VII, but it clarifies the statutory definition of sex.[22]

In the PDA, Congress expressly included pregnancy in Title VII's definition of "sex."[23] Congress wanted to ensure that Title VII protected women in their capacity as the only members of society with the physical ability to bear children.[24] Additionally, Congress hoped that the PDA would lead to an end of plaintiffs' need to resort to disparate impact theories in pregnancy discrimination cases under Title VII.[25] Thus, Congress intended that the PDA allow plaintiffs to successfully invoke disparate treatment as a legal theory under Title VII.[26] Further, Congress intended to "guarantee women the basic right to participate fully and equally in the work force, without denying them the fundamental right to full participation in family life."[27] The implication of the legislative history is that Congress intended the PDA to be functionally broad.[28] Congress tracked Justice Brennan's *Gilbert* dissent suggesting that it intended the courts to step away from formalism and instead assure women that they may participate, as men are able, in both the workforce and family life.[29]

In the amendment, Congress defined "sex" under Title VII as follows:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.[30]

Arguably, the amendment has two clauses.[31] The PDA contains the definitional clause first, which includes pregnancy, childbirth, and other "related medical

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of the amendment).

22. 42 U.S.C. § 2000e(k) (2006).

23. *Id.*

24. *See* H.R. REP. NO. 95-948, at 3 (noting that the goal of the amendment is to eradicate confusion by broadening the definition of sex).

25. *See id.*

26. *See id.* (noting that the PDA was introduced to "change the definition of sex discrimination . . . to reflect the commonsense view and to ensure that working women are protected against all forms of employment discrimination based on sex").

27. *See* 123 CONG. REC. 29,658 (daily ed. Sept. 16, 1977) (statement of Sen. Williams).

28. *See* H.R. REP. NO. 95-948, at 3; 123 CONG. REC. 29,658 (daily ed. Sept. 16, 1977) (statement of Sen. Williams).

29. *Compare* 42 U.S.C. § 2000e(k) (2006) (including pregnancy expressly in the definition of sex), *with* Gen. Elec. Co. v. Gilbert 429 U.S. 125, 146-60 (1976) (Brennan, J., dissenting) (arguing that discrimination on the basis of pregnancy is per se sex discrimination); *see also* H.R. REP. NO. 95-948, at 2 (noting that Congress agreed with the *Gilbert* dissenters).

30. 42 U.S.C. § 2000e(k).

31. Jessica Carvey Manners, Note, *The Search for Mr. Troupe: The Need to Eliminate Comparison Groups in Pregnancy Discrimination Act Cases*, 66 OHIO ST. L.J. 209, 212 (2005).

conditions" in Title VII's definition of "sex."[32] Second, and more important for the purposes of this Note, is the "equality" clause.[33] The equality clause states that employers must treat women who fall into the umbrella provided by the definitional clause equally to employees who do not fit into the definitional clause but are similar in their ability (or inability) to work.[34] This language is the starting point for a court in determining what disparate treatment is in a PDA case.[35]

C. Overview of U.S. Supreme Court Precedent Interpreting the Scope of the PDA

In *Newport News Shipbuilding & Drydock Co. v. EEOC*,[36] the EEOC filed a suit against an employer in which it alleged that the employer's sponsored healthcare plan unlawfully covered maternity related hospital stays for female employees to a greater extent than it did for the spouses of male employees.[37] The Court held that the plan was unlawful sex-based discrimination because the husbands of female employees had hospitalization coverage equal to the male employees, but the wives of male employees were denied pregnancy related hospitalization coverage when female employees were covered.[38]

The Court reasoned that:

> the [PDA] has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex. And since the sex of the spouse is always the opposite of the sex of the employee, it follows inexorably that discrimination against female spouses in the provision of fringe benefits is also discrimination against male employees.[39]

The case illustrates that the Court registered Congress's displeasure with the framing it used in *Gilbert*.[40] The Court, instead of using the *Gilbert* framework and considering only mutuality of coverage,[41] looked broadly at the categories of coverage excluded and determined that the employer discriminated because of

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32. *See* 42 U.S.C. § 2000e(k); Manners, *supra* note 31, at 212.

33. *See* Manners, *supra* note 31, at 212.

34. *Id.*

35. *See, e.g.*, EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1191-92 (10th Cir. 2000) (including the "similarly situated" language of the equality clause in the prima facie requirements for a case of disparate treatment under the PDA).

36. 462 U.S. 669 (1983).

37. *Id.* at 674.

38. *Id.* at 683-84.

39. *Id.* at 684.

40. *See id.*

41. *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 139 (1976), *superseded by statute*, 42 U.S.C. § 2000e(k) (2006).

pregnancy.[42]

In *California Federal Savings & Loan Ass'n v. Guerra*,[43] the employer of a pregnant worker sought a declaration that Title VII pre-empted a California law.[44] The challenged law required employers to provide unpaid leave and qualified reinstatement for pregnant women.[45] It noted that Congress indicated in the Civil Rights Act of 1964 that it only pre-empted state laws if there was actual conflict between the Act and state law.[46] Thus, only if compliance with both the California leave requirement and the PDA was either physically impossible or the California leave requirement stood in the way of accomplishing Title VII's objectives, should the California law should be struck down as pre-empted.[47] As a result, the question was whether the "equality" clause of the PDA prohibited preferential treatment of pregnant women under Title VII.[48] The Court held that it did not.[49] Instead, it determined that Congress simply intended to overrule *Gilbert* with the equality clause.[50] According to the Court, Congress meant the PDA to remedy pregnancy discrimination, not prohibit favorable treatment of pregnant employees.[51] Thus, the PDA is the floor of legal protection that Congress allows pregnant women, not the ceiling.[52]

In *UAW v. Johnson Controls, Inc.*,[53] the employer had a policy prohibiting all women of childbearing age without medical documentation of infertility from working in positions that involved actual or potential exposure to lead.[54] The purpose of the policy was to protect fetuses from harmful lead exposure.[55] The Court held that the policy classified explicitly based on childbearing capacity, not fertility (a gender-neutral status); thus, it was sex-based discrimination under the PDA.[56] Further, the Court held that Johnson Controls could not justify the discrimination as a bona fide occupational qualification[57] because the safety at

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42. *See Newport News Shipbuilding & Dry Dock Co.*, 462 U.S. at 684.
43. 479 U.S. 272 (1987).
44. *Id.* at 279.
45. *Id.* at 275-76.
46. *Id.* at 281-82 (quoting 42 U.S.C. § 2000e-7).
47. *Id.* at 281.
48. *See id.* at 284.
49. *Id.* at 285.
50. *Id.*
51. *Id.* at 285-86.
52. *Id.* at 285.
53. 499 U.S. 187 (1991).
54. *Id.* at 192.
55. *See id.* at 191-93.
56. *Id.* at 199.
57. A bona fide occupational qualification is a narrow defense that Title VII provides to employers. *See* 42 U.S.C. § 2000e-2(e)(1) (2003). It allows an employer to discriminate in certain instances where the protected trait is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." *Id.* The Supreme Court has construed it narrowly. *Johnson Controls Inc.*, 499 U.S. at 201. It was the only defense available

issue concerned the safety of fetuses not the safety of third parties or consumers.[58] The Court noted that the PDA contained its own bona fide occupational qualification standard, and the "equality" clause of the PDA means that "women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job."[59] The Court observed that the legislative history confirmed its reading of the statute because it indicates that Congress wrote the "equality" clause to ensure that female employees are treated the same as male employees regardless of childbearing ability.[60]

The passage of the PDA is a powerful statement of Congress's interest in protecting pregnant women from discrimination in their places of employment.[61] Congress's intervention after its observation of the Supreme Court's ruling in *Gilbert* illustrates that Congress wanted a uniform judicial approach to Title VII cases brought by pregnant women.[62] The Supreme Court recognized in the early days of the PDA that the amendment extended Title VII's reach to pregnant women,[63] and the Court recognized further that the protections that Title VII offered to pregnant women were the floor of the protective social legislation, not the ceiling.[64] The Supreme Court's interpretation of the PDA indicates that it understood that Congress did not intend the amendment to confer additional benefits on pregnant women, but that it did want to remedy pregnancy discrimination effectively.[65] However, the Supreme Court left the nuances of judicially determining disparate treatment in pregnancy discrimination cases to be resolved at the appellate level.

D. The Process of Litigation in Title VII Suits Based on Pregnancy Discrimination

In order to understand why IVF patients require a different judicial approach to disparate treatment, it is important to grasp how Title VII litigation works and how the various U.S. circuits deal with the question of whether disparate treatment exists in a PDA case. Each Title VII case follows a general process, and a plaintiff has several strategic options when she brings her claim. The circuits take different approaches when they determine whether a defendant

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to Johnson Controls due to the facially discriminatory nature of the policy in question. *Id.* at 196.

58. *Johnson Controls Inc.*, 499 U.S. at 203-04.

59. *Id.* at 204.

60. *Id.*

61. *See supra* notes 20-34 and accompanying text.

62. *See* H.R. REP. NO. 95-948, at 2-3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4750-51.

63. *See* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983) (noting that any discrimination based on pregnancy is discrimination based on sex for the purposes of Title VII).

64. *See* Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 285 (1987) (noting that states may enact legislation that places more rigorous burdens on employers of pregnant women).

65. *See Johnson Controls Inc.*, 499 U.S. at 204 (noting that the PDA instructs employers to treat women, regardless of their childbearing ability, the same as their male colleagues).

subjected its employee to disparate treatment.

A plaintiff in a Title VII case using the PDA may prove unlawful discrimination in two ways.[66] She may proceed under a disparate impact theory, which requires her to show statistical evidence that a facially neutral employment policy has a discriminatory impact on protected persons.[67] These cases do not generally require that the plaintiff show that her employer had a discriminatory intent.[68] Once the plaintiff shows discriminatory impact, the defendant has an opportunity to put forward a business necessity defense.[69]

But typically, a plaintiff in a Title VII case proceeds under a disparate treatment theory.[70] Under this theory, a plaintiff uses either direct or indirect evidence to show that her employer intentionally discriminated against her based on a protected characteristic, which for the purposes of this Note, is her effort to achieve pregnancy through IVF. It is difficult for plaintiffs to produce direct evidence.[71] A plaintiff who chooses to proceed on indirect evidence may use the *McDonnell Douglas*[72] burden-shifting framework.[73] Under this test, the plaintiff must first establish a "prima facie case by a preponderance of the evidence."[74] In order to do that a plaintiff must show: (1) that she is a member of a protected group; (2) that she is qualified for the position; (3) that the defendant took adverse employment action; and (4) that the defendant treated the plaintiff less favorably than other employees who were not members of the protected group but were similar in their ability or inability to work.[75] If the plaintiff can articulate a prima facie case for discrimination, "the burden of production then shifts to the defendant who must articulate a legitimate, non-discriminatory reason for the adverse employment action."[76] If the defendant does that successfully, the plaintiff can only block summary judgment if she can show that her IVF status was the determinative factor in her adverse employment action.[77]

The United States appellate courts have taken different approaches to defining "similarly situated" for the purposes of proving disparate treatment under the fourth prong of the *McDonnell Douglas* burden-shifting test.[78] The

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66. William G. Phelps, Annotation, *What Constitutes Termination of an Employee Due to Pregnancy in Violation of Pregnancy Discrimination Act Amendment to Title VII of Civil Rights Act of 1964*, 130 A.L.R. FED. 473 § 2[a] (1996).

67. Spivey v. Beverly Enters., Inc., 196 F.3d 1309, 1312 (11th Cir. 1999).

68. Phelps, *supra* note 66.

69. *Id.*

70. *Id.*

71. Dana Page, *D.C.F.D.: An Equal Opportunity Employer—As Long as You Are Not Pregnant*, 24 WOMEN'S RTS. L. REP. 9, 14 (2002).

72. 411 U.S. 792, 802-05 (1973).

73. EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1191 (10th Cir. 2000).

74. *Id.*

75. *Id.* at 1192.

76. *Id.* at 1191.

77. *Id.*

78. *Compare, e.g.*, Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994), *with*

U.S. courts of appeals have yet to consider the issue of disparate treatment in IVF cases under the PDA.[79] Thus, in order to examine actual judicial application of the "similarly situated" standard, one must examine it in the pregnancy context. All plaintiffs who pursue a disparate treatment theory in a PDA case and proceed on indirect evidence are required to prove that their employer would have treated another employee who does not exhibit the protected characteristic but is "similarly situated" in his or her ability (or inability) to work more favorably than it treated the plaintiff.[80] Thus, the "similarly situated" standard is likely what courts will require IVF plaintiffs to meet.

In *Troupe v. May Department Stores Co.*,[81] the Seventh Circuit defined "similarly situated" in terms of the expense the employee caused the employer.[82] Lord & Taylor department store, the employer, terminated Troupe on the day that her maternity leave was to begin.[83] Over the course of her pregnancy, Troupe suffered particularly severe morning sickness, and as a result, she was late to work several times.[84] Her employer put her on probation, and during her probationary period Troupe was late several more times.[85] However, Troupe's employer did not fire her at the conclusion of her probationary period.[86] Instead, Lord & Taylor waited until just before Troupe's maternity leave was to begin.[87]

Troupe's supervisor told her that Lord & Taylor was not firing Troupe because of her tardiness but, instead, because the company believed that she would not return after her maternity leave concluded.[88] If the employer fired Troupe for chronic lateness, it did not act unlawfully as long as the employer would have fired someone who was not pregnant but was also consistently late.[89] The Seventh Circuit held that if the employer did fire Troupe because it feared that she would not return upon the conclusion of her maternity leave, the termination was legal as long as the employer would have also fired a man who

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Horizon/CMS Healthcare Corp., 220 F.3d at 1195 nn.6-7.

79. *See infra* Part II.B (explaining that courts have dismissed most cases involving fertility treatment as being based on fertility, a sex-neutral condition, and never reached the question of disparate treatment). *Hall v. Nalco Co.* did not address the correct standards for disparate treatment in IVF absence cases because of the procedural posture in which it arrived at the Seventh Circuit. *See* Hall v. Nalco Co., 534 F.3d 644, 645 (7th Cir. 2008). The focus of the court was solely whether Hall stated a lengthy cognizable claim when she alleged that Nalco illegally discriminated against her by allegedly firing her because of her IVF related absence. *Id.*

80. *Horizon/CMS Healthcare Corp.*, 220 F.3d at 1192 (setting forth the requirements for a plaintiff to prove disparate treatment in a PDA case).

81. 20 F.3d 734 (7th Cir. 1994).

82. *Id.* at 738.

83. *Id.* at 735-36.

84. *Id.* at 735.

85. *Id.*

86. *Id.*

87. *Id.* at 736.

88. *Id.*

89. *Id.* at 737-38.

was about to embark on sick leave for, say, a kidney transplant.[90] According to the court, an employer can treat a pregnant woman "as badly as [it] treat[s] similarly affected but nonpregnant employees."[91] As long as Lord & Taylor fired Troupe because of her expensive nature, and the employer fired all other employees similar in expense, then the court could not infer that Troupe was fired because of her pregnancy.[92]

In *Urbano v. Continental Airlines, Inc.*,[93] the Fifth Circuit Court of Appeals selected a "similarly situated" standard that is seemingly the narrowest imaginable.[94] In order to establish a case under this test, the Fifth Circuit required that the plaintiff be compared to a limited group.[95] In *Urbano*, a doctor ordered the plaintiff, a pregnant woman, to refrain from heavy lifting.[96] As a result, the plaintiff requested a modified work assignment so she would have to lift no more than twenty pounds.[97] The employer had a policy by which it allowed modified work assignments, but only if the employee required it because of an on-the-job injury.[98] Because the plaintiff's pregnancy was not an on-the-job injury, the employer refused to give her a modified work assignment.[99] The Fifth Circuit upheld the employer's refusal.[100] The court reasoned that the most appropriate comparison group would be non-pregnant employees with non-occupational injuries.[101] Thus, because the employer's denial to the plaintiff was no different than its response to any other non-occupationally injured employee's modified duty request, the employer had not, according to the Fifth Circuit, acted unlawfully.[102] The Sixth and Eleventh Circuits have also determined that when an employer has objective qualifications, such as the injury's location for modified duty work, those qualifications ought to be part of the disparate treatment analysis.[103]

In *EEOC v. Horizon/CMS Healthcare Corp.*,[104] the Tenth Circuit Court of Appeals suggested a slightly broader comparison group in order to apply the "similarly situated" standard.[105] Unlike the Fifth, Sixth, and Eleventh Circuits,

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90. *Id.* at 738.
91. *Id.*
92. *Id.*
93. 138 F.3d 204 (5th Cir. 1998).
94. *See id.* at 208.
95. *Id.*
96. *Id.* at 205.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 208.
101. *Id.*
102. *See id.*
103. Reeves v. Swift Transp. Co., 446 F.3d 637, 642 (6th Cir. 2006); Spivey v. Beverly Enters., Inc., 196 F.3d 1309, 1313 (11th Cir. 1999).
104. 220 F.3d 1184 (10th Cir. 2000).
105. *Id.* at 1194-95.

the Tenth Circuit suggested that the proper comparison group to determine whether the employer ought to assign modified work duty is simply all employees who are injured, regardless of where those injuries took place.[106] In *Horizon*, the plaintiffs were four pregnant nursing home employees who alleged that their employer denied them modified duty in violation of Title VII as amended by the PDA.[107] The defendant maintained a policy by which employees were allowed to work in modified duty positions consistent with any work restrictions made by an employee's physician, provided that the reason the employee had work restrictions was a work-related injury.[108] The Tenth Circuit assumed, without deciding, that the proper comparator group would be all employees who were injured and required modified duties, regardless of where the injury occurred.[109] But the Tenth Circuit did not need to decide that this was the proper standard because it found that the employer failed even under the narrower Fifth Circuit standard.[110]

II. OVERVIEW OF JUDICIAL TREATMENT OF IVF CASES UNDER THE PDA

The judiciary and scholars have had problems trying to determine whether IVF and other aggressive fertility procedures should fall under the PDA's protection.[111] In attempting to understand the debate, the basics of IVF and other aggressive fertility treatments must be first understood and then the factual contexts of federal IVF cases may be compared to illustrate why the Seventh Circuit correctly concluded that the PDA protects a woman who is undergoing IVF treatment.[112]

A. Brief overview of IVF

IVF is part of a family of aggressive fertility procedures meant to help an infertile couple conceive.[113] A doctor will diagnose a couple as infertile only after that couple has failed to become pregnant after a year of consistent unprotected sexual intercourse.[114] Infertility can exist because of a defect in the

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106. *Id.* at 1195 n.7.

107. *Id.* at 1189.

108. *Id.*

109. *Id.* at 1195.

110. *Id.*

111. *See* Hall v. Nalco Co., 534 F.3d 644, 648 (7th Cir. 2008) (discussing the various factual settings where the question of whether IVF treatment is protected under the PDA); Cintra D. Bentley, Note, *A Pregnant Pause: Are Women Who Undergo Fertility Treatment to Achieve Pregnancy Within the Scope of Title VII's Pregnancy Discrimination Act?*, 73 CHI.-KENT L. REV. 391, 391-92 (1998) (discussing the issue of whether IVF treatment should be protected under the PDA).

112. *See Hall*, 534 F.3d at 649.

113. THE CORNELL ILLUSTRATED ENCYCLOPEDIA OF HEALTH 659 (Antonio M. Gotto Jr. ed., 2002).

114. *Id.* at 657.

contribution to the pregnancy of either the male partner, the female partner, or both partners.[115] IVF, Gamete Intrafallopian Transfer, and Zygote Intrafallopian Transfer are the three most aggressive forms of infertility treatment currently in existence.[116]

All three of these fertility treatments are composed of the same four steps.[117] The only difference is where the fertilization of the egg takes place.[118] First, the doctor must stimulate a woman's ovulation.[119] In order to achieve this effect, a physician will prescribe one of many different available fertility drugs.[120] Second, the doctor retrieves the eggs in an invasive procedure, either transvaginal ultrasound aspiration or laparoscopy.[121] Third, the doctor inseminates the eggs with either fresh or frozen sperm from either the woman's partner or a donor.[122] Approximately forty hours later, the doctor places the inseminated eggs back in the woman's uterus.[123] The success rate for each episode of embryo transfer in IVF treatment is approximately twenty-five percent.[124]

B. Title VII Law in the Context of Infertility Treatment

In *Pacourek v. Inland Steel Co.*,[125] Charline Pacourek's employer, Inland Steel, fired her from her position as senior price computer in June 1993.[126] In 1986, Pacourek found out that she had esphofical reflux, "a medical condition that prevented her from becoming pregnant naturally."[127] Sometime after 1986, Pacourek informed her employer that she was undergoing IVF treatment in an effort to become pregnant.[128] Pacourek alleged that after her disclosure, her supervisor "disparately applied a sick leave policy to" her absence due to her IVF treatment.[129] Further, Pacourek alleged that another supervisor expressed his "doubt as to her ability to become pregnant and her ability to combine pregnancy and her career."[130] The same supervisor informed her that her condition was a problem while handing her a memorandum placing her on probation.[131]

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115. *Id.*
116. *Id.* at 659.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 649.
122. *Id.*
123. *Id.*
124. *Id.*
125. 858 F. Supp. 1393 (N.D. Ill. 1994).
126. *Id.* at 1396.
127. *Id.*
128. *Id.*
129. *Id.* at 1397.
130. *Id.*
131. *Id.*

Ultimately, Inland terminated Pacourek's employment.[132]

The court held that it is unlawful to discriminate against employees based on intended or potential pregnancy, and because Pacourek's attempted pregnancy through IVF was a still a "intended or potential pregnancy," the court held that the PDA protects it.[133] The court concluded in light of the PDA's language and the legislative history, "that the PDA was intended to cover a woman's intention or potential to become pregnant, because all that conclusion means is that discrimination against persons who intend to or can potentially become pregnant is discrimination against women."[134] In addition to the broad language of the statute and its legislative history, the court relied on *UAW v. Johnson Controls, Inc.*,[135] to come to its conclusion.[136]

The court noted, however, that to hold discrimination because of potential or intended pregnancy unlawful does not necessarily mean that Pacourek's health condition that prevented her from becoming pregnant is a condition medically related to pregnancy under the PDA.[137] Nonetheless, the court concluded that "a woman's medical condition rendering her unable to become pregnant naturally is a medical condition related to pregnancy and childbirth" under the PDA.[138] The court applied a canon of statutory construction that instructs courts to broadly construe civil rights laws.[139] Further, the court reasoned that the language of the PDA itself sweeps broadly, and thus, its holding followed from a natural reading of the statutory language.[140] The court reasoned under *Johnson Controls*, that if "potential pregnancy is treated like pregnancy for the purposes of the PDA, it follows that potential-pregnancy-related medical conditions should be treated like pregnancy-related medical conditions for the purposes of the PDA."[141] The court swept Pacourek's condition into the protection of the PDA because it concerned the initiation of pregnancy and thus was medically related to pregnancy.[142]

In *Krauel v. Iowa Methodist Medical Center*,[143] Mary Jo Krauel sued her employer, alleging that its denial of insurance coverage for her fertility treatments violated the PDA.[144] The court held that the treatment of infertility was not the treatment of a medical condition related to pregnancy or childbirth

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132. *Id.* at 1396.
133. *Id.* at 1401-02.
134. *Id.* at 1401.
135. 499 U.S. 187 (1991).
136. *Pacourek*, 858 F. Supp. at 1401-02.
137. *Id.* at 1402.
138. *Id.* at 1403.
139. *Id.* at 1402.
140. *Id.* at 1402-03.
141. *Id.* at 1403.
142. *See id.* at 1403-04.
143. 95 F.3d 674 (8th Cir. 1996).
144. *Id.* at 676.

protected under the PDA.[145] The court appealed to the rules of statutory construction.[146] It noted that courts should understand "related medical conditions" to refer to the more specific terms, "pregnancy" and "childbirth" that precede it.[147] It used this method of construction to distinguish between conception and pregnancy, and infertility that prevents conception.[148] Further, the court noted that the PDA's legislative history does not mention infertility.[149] Thus, the court decided, infertility is not a sex-related medical condition.[150]

In *Saks v. Franklin Covey Co.*,[151] Rochelle Saks brought suit under the PDA against her employer because its self-insured employee health benefits plan denied her claim for expenses related to surgical impregnation procedures.[152] The court found that with respect to Saks's infertility discrimination claim the threshold question was whether the PDA's prohibition of pregnancy-based discrimination extends to infertility-based discrimination.[153] Ultimately, the court held that it does not.[154] The court noted that at the core of PDA protection is Title VII protection, and Title VII prohibits discrimination "because of sex."[155] The court reasoned that reproductive capacity is common to both men and women, and as a result, the PDA cannot introduce "a completely new classification of prohibited discrimination based solely on reproductive capacity."[156] The court noted further that its holding comports with *Johnson Controls* because, in that case, the Supreme Court drew a line between discrimination based on "childbearing capacity" and "fertility alone."[157] According to the Second Circuit, *Saks* is only about infertility, and "infertility standing alone does not fall within the meaning of the phrase related medical conditions under the PDA."[158]

C. The Seventh Circuit's Decision to Hold IVF Treatment as a Protected Status Under the PDA

On July 16, 2008, in *Hall v. Nalco Co.*, the Seventh Circuit was the first U.S. appellate court to address whether a woman who is fired allegedly because of her absences related to IVF treatment, can state a claim for discrimination under the

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145. *Id.* at 679-80.
146. *Id.* at 679.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 679-80.
151. 316 F.3d 337 (2d Cir. 2003).
152. *Id.* at 340.
153. *Id.* at 345.
154. *Id.* at 346.
155. *Id.* at 345.
156. *Id.*
157. *Id.* at 345-46 (quoting UAW v. Johnson Controls, Inc., 499 U.S. 187, 198 (1991)).
158. *Id.* at 346 (internal quotations omitted).

PDA.[159] The court held that an employee in that situation has a legally cognizable Title VII claim.[160] Nalco hired Cheryl Hall in 1997, and in 2000, she attained the title of sales secretary.[161] In March 2003, Hall requested a leave of absence in order to undergo a round of IVF.[162] Hall's March IVF treatment failed.[163] In July, she filed another request for a leave of absence, which was to commence in August.[164] Just before Hall's second leave was to begin, Nalco informed Hall that it was consolidating its offices and that it would retain only one staff member in her position.[165] Further, Nalco informed Hall that it would not retain her.[166] Hall's supervisor at Nalco told her that it was in her "best interest" that she not be retained because of her "health condition," and in Hall's job performance review the supervisor noted that Hall was frequently absent due to infertility treatments.[167]

Hall alleged that Nalco fired her because she was "a member of a protected class, female with a pregnancy related condition, infertility."[168] The district court granted summary judgment in favor of Nalco on Hall's claim under the PDA on the grounds that infertile women are not a protected class under the PDA because infertility is a gender-neutral condition.[169]

The Seventh Circuit Court of Appeals reversed.[170] The court acknowledged that infertility is a gender-neutral condition but distinguished Hall's claim from one based on infertility alone.[171] The key piece of the claim was that she was undergoing IVF in order to become pregnant.[172] According to the court, Hall's claim was inextricably tied to sex because of its implications for Hall's childbearing capacity.[173] The Seventh Circuit distinguished *Krauel* and *Saks* from *Hall* because *Krauel* and *Saks* based their analysis heavily on the issue of infertility alone, but that type of reliance is "misplaced in the factual context of [*Hall*]."[174]

The court reasoned that *Hall* was much more like *Johnson Controls* because in that case fertility was important, but the conduct complained of was not gender

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159. Hall v. Nalco Co., 534 F.3d 644, 645-46 (7th Cir. 2008).
160. *Id.* at 649.
161. *Id.* at 645.
162. *Id.*
163. *Id.* at 646.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* at 649.
171. *Id.* at 647-49.
172. *Id.* at 648-49.
173. *Id.*
174. *Id.* at 648.

neutral.[175] In *Hall*, the Seventh Circuit reasoned that Nalco's action amounted to the same thing.[176] "Employees terminated for taking time off to undergo IVF—just like those terminated for taking time off to give birth . . . will always be women. This is necessarily so; IVF is one of several assisted reproductive technologies that involves a surgical impregnation procedure."[177] Thus, the court concluded, if the facts are taken in the light most favorable to Hall, Nalco terminated her for the sex-specific characteristic of childbearing capacity not the sex-neutral condition of infertility.[178] Therefore, it appears that the Seventh Circuit extended protection of the PDA to women who must be absent from work due to IVF treatment because adverse employment action based on childbearing capacity is always sex-based discrimination.[179] In light of *Johnson Controls*, the Seventh Circuit made the right decision.[180] However, it is unclear how a woman in this situation could actually prove that her employer subjected her to disparate treatment.

III. THE PROBLEM WITH THE "SIMILARLY SITUATED" STANDARD

According to the Federal Department of Health and Human Services, approximately ten percent of women aged fifteen to forty-four in the United States had trouble becoming pregnant or carrying a baby to term in 2002.[181] Infertility is a problem that is not going away, and because women are employed in large numbers,[182] we can expect more cases like Hall's. As a result, it is important for the courts to determine a workable solution for the nuanced problem of defining disparate treatment under the PDA for women undergoing IVF and other aggressive fertility procedures. The problem that this Note seeks to address is contained within the fourth prong of the *McDonnell Douglas* test[183] as courts apply it to PDA cases.[184] After *Hall*, it should be straightforward for

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175. *Id.* at 648-49.

176. *Id.*

177. *Id.*

178. *Id.* at 649.

179. *See id.*

180. *See* 499 U.S. 187, 198 (1991).

181. Frequently Asked Questions: Infertility, *supra* note 2.

182. *See* Catherine Rampell, *As Layoffs Surge, Women May Pass Men in Job Force*, N.Y. TIMES, Feb. 6, 2009, at A1 (noting that although women make up approximately 47.1% of the work force, the industries hit hardest by the recession are occupied primarily by men, putting women in the position of being close to the majority of American workers for the first time in history).

183. *See* EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1192 (10th Cir. 2000) (noting that the four factors of the McDonnell Douglas test as it is applied in PDA cases require the plaintiff to show: (1) that she is a member of a protected group; (2) that she is qualified for the position; (3) that the defendant took adverse employment action; (4) that the defendant treated the plaintiff less favorably than other employees who were not members of the protected group but were similar in their ability or inability to work).

184. *Id.* (noting that the fourth prong is whether the employer treated the employee less

a woman undergoing IVF to assert facts that fulfill the first three requirements of the test,[185] but the fourth factor, the "similarly situated" standard, is a problem for plaintiffs who are undergoing IVF.[186] In cases with plaintiffs who base their claims on IVF treatment, the "similarly situated" standard does not fulfill Congress's intention in enacting the PDA.[187] The "similarly situated" standard also presents policy-based problems in cases with plaintiffs who are seeking to prove that their employers discriminated against them because of their IVF status.

A. The "Similarly Situated" Standard is Flawed in Light of Congress's Purpose in Enacting the PDA

The "similarly situated" standard does not provide women with the full extent of protection that Congress envisioned when it enacted the PDA.[188] A rigid reliance on positive law, legal formalism, pervades the judicial application of this standard, [189] even in the Tenth Circuit, which put forth the broadest application of any circuit court.[190] A court's choice to rely on positive black letter law is not inherently wrong, but the positivist application of the "similarly situated" standard does not fulfill the intention of Congress.[191] Although the "similarly situated" language appears in the "equality clause" of the statute, the plain language and the Supreme Court precedent interpreting the statute do not cabin the disparate treatment analysis in these cases to the narrow formal equality the federal courts of appeals have enforced as the law.[192] Instead of seeking out actual equality for men and women in the workplace, this rigid black letter interpretation of the standard promotes nothing more than mere formal

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favorably than other employees not in the protected class but "similarly situated" in their ability or inability to work).

185. *See* Hall v. Nalco Co., 534 F.3d 644, 649 (7th Cir. 2008) (establishing that women undergoing IVF treatment are protected under the PDA).

186. *See Horizon/CMS Healthcare Corp.*, 220 F.3d at 1195; Urbano v. Cont'l Airlines, Inc., 138 F.3d 204, 207 (5th Cir. 1998); Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994).

187. *See* H.R. REP. NO. 95-948, at 3-4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4752-53.

188. *See* 123 CONG. REC. 29,658 (daily ed. Sept. 16, 1977) (statement of Sen. Williams) (noting that under the PDA Congress sought to "guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life").

189. *See* Eric Engle *The Fake Revolution: Understanding Legal Realism*, 47 WASHBURN L.J. 653, 660 (2008) (noting that "legal formalism" can mean "legalism," which is a rigid inflexible application of black letter law without regard to the practical consequences).

190. *See Horizon/CMS Healthcare Corp.*, 220 F.3d at 1191.

191. *See* 123 CONG. REC. 29,658 (daily ed. Sept. 16, 1977) (statement of Sen. Williams).

192. *See* 42 U.S.C. § 2000e(k) (2006); Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 285-86 (1987); *see also* discussion *supra* Part I.D.

equality.[193] The problem is that fertility treatment is different in kind from kidney disease and broken bones. That difference is not only that IVF treatment is a protected characteristic but also that its effects and duration are so uncertain.[194]

The current judicial interpretation of disparate treatment under the PDA only catches the most obvious examples of pregnancy-based discrimination.[195] As a result, a woman is still not safe in her workplace from the threat of adverse employment action based on her pregnancy or other medically related conditions.[196] The House Committee Report that accompanied the PDA stated that "testimony received by this committee demonstrates, the assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and it is at the root of the discriminatory practices which keep women in low-paying and deadend jobs."[197] As a result of the phenomenon described in the House Committee Report, women in Hall's situation are in an even more precarious position than pregnant women because of the subtlety of the issues surrounding IVF treatment.[198] IVF, unlike pregnancy, is more purely a health status that is closely associated with disease and complication.[199] Further, it is unclear how long a woman might continue to pursue IVF treatment in order to achieve a pregnancy.[200] The uncertain nature of the woman's time commitment to undergoing IVF treatment provides a huge incentive to her employer to terminate her because of her potentially high cost.[201] Under the "similarly situated" standard, if an employer terminated an IVF

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193. *See, e.g.*, Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994).

194. *See supra* Part II.A (discussing IVF treatment).

195. *See* Manners, *supra* note 31, at 222-24 (discussing how the "similarly situated" standard does not promote the purpose of the PDA because it does not protect most pregnant employees).

196. *See* 42 U.S.C. § 2000e(k) (requiring that employers not take adverse employment action against employees because of the employees' pregnancy or medically related condition); *but see* Reeves v. Swift Transp. Co., 446 F.3d 637, 642-43 (6th Cir. 2006) (finding no unlawful disparate treatment when a pregnant woman was denied light duty assignment because her pregnancy was not an injury sustained on the job); Spivey v. Beverly Enters., Inc., 196 F.3d 1309, 1311 (11th Cir. 1999) (finding no disparate treatment or disparate impact when a woman was terminated due to pregnancy induced physical limitations); Urbano v. Cont'l Airlines, Inc., 138 F.3d 204, 208 (5th Cir. 1998) (finding that employer's denial of light duty assignment to a woman limited in her physical ability due to pregnancy was not unlawful); Troupe v. May Dep't Stores Co., 20 F.3d 734, 738-39 (7th Cir. 1994) (finding that an employer's termination of a woman due to either lateness because of her morning sickness or a fear that she would not return after her maternity leave was not unlawful).

197. H.R. REP. NO. 95-948, at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4751.

198. *See supra* Part II.A-B.

199. Paul Ogburn Jr., *Deadly Deliveries*, N.Y. TIMES, Oct. 14, 2007, at CY14 (noting the close association between fatal maternal complications and IVF treatment).

200. *See supra* Part II.A.

201. *Cf. Troupe*, 20 F.3d at 738 (noting that the expense of an employee's leave is a significant reason for the employer to fire the employee).

patient, even though the employer is acting directly on the protected characteristic, the employer's action would be legal.[202]

Additionally, IVF treatment still is subject to a lot of societal contention, and thus, it is more difficult for the courts to evenhandedly determine what disparate treatment is in this context.[203] Broadly, Congress wanted to provide women with a legal mechanism that would allow them to avoid being pigeonholed in "low-paying and deadend jobs."[204] Therefore, that legal mechanism would have to combat the stereotypes that pervade the perception that employers have of women in relation to their business.[205] In the context of pregnancy discrimination based on IVF treatment, that means the courts need to be extra vigilant for disparate treatment because of the uncertain position that IVF treatment occupies in society.[206] Thus, in order to prevent discrimination in cases that involve IVF, the courts need to look at the employer's action in light of the protected characteristic, and the "similarly situated" standard does not allow the courts to do that.[207]

Additionally, Congress wanted the PDA to lessen the need for disparate impact as a theory of discrimination.[208] In order for women to take full advantage of the protections of Title VII, they must resort to disparate impact theories because of the cramped formal nature of the current judicial interpretation of disparate treatment.[209] Therefore, with regard to Congress's preference for a type of litigation that results from the statute, the "similarly situated" standard also thwarts Congressional intent.

B. Public Policy Supports a New Approach to Disparate Treatment in IVF Based PDA Cases

It is not uncommon to hear in popular discourse that today's women "want to do it all."[210] Although patronizing all on its own, this phrase is often accompanied by criticism, as though women are not entitled to anything more

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202. *See id.*

203. *See* Ann Adams Lang, *Doctors Are Second Guessing the 'Miracle' of Multiple Births*, N.Y. TIMES, June 13, 1999 § 15, at 4 (noting that "[e]thics, emotion and money . . . cloud the already murky waters of assisted reproduction").

204. *See* H.R. REP. NO. 95-948, at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4751.

205. *See* Peggy Orenstein, *In Vitro We Trust*, N.Y. TIMES, July 20, 2008, at MM11 (noting that a perception exists that IVF is not an acceptable medical procedure).

206. *See id.*

207. *See In re* Carnegie Ctr. Assocs., 129 F.3d 290, 306 (3d Cir. 1997) (McKee, J., dissenting) (noting that the employer's action in firing a woman because of her absence on maternity leave was functionally equivalent to firing her because she was pregnant).

208. *See* H.R. REP. NO. 95-948, at 3.

209. *See, e.g.*, Spivey v. Beverly Enters., Inc., 196 F.3d 1309, 1312 (11th Cir. 1999) (noting that plaintiffs may proceed on either a disparate treatment theory or a disparate impact theory).

210. *See* Bentley, *supra* note 111, at 391.

than they already have.[211] The reality is that many women who might fall into this category only want what men have had all along, the ability to maintain both family and career.[212] Said differently, women want fairness in employment. Although the law, through mechanisms like Title VII, gave women the opportunity to get their feet in the doors of mega corporations and law firms, women continue to struggle for legitimate status as true players in corporate America.[213]

It is in the general interest of women that employers truly accept them and present them with equal opportunity to gain employment commensurate with their skill and education even though the physical responsibility for bearing children falls to them.[214] Employers can help women realize their interests by avoiding the use of stereotyping when they make their employment decisions.[215] The law can help ensure that women realize their interests by requiring that the courts actually examine the reasons employers make employment decisions that involve women who are protected by the PDA.[216] If the reason that the employer is making an employment decision is actually the employee's IVF status, then the PDA mandates that the court step in and protect the woman.[217] The "similarly situated" standard does not allow the court to consider what the employer is actually doing.[218] It instructs the court to stamp its judicial "OK" to functional instances of adverse employment action based on pregnancy in all but the most facially discriminatory cases.[219] The broad interests of fairness and equal

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211. Jodi Kantor & Rachel L. Swarns, *A New Twist in the Debate Over Mothers*, N.Y. TIMES, Sept. 2, 2008, at A1.

212. *See id.*

213. *See* Barnard & Rapp, *supra* note 6, at 130-31.

214. *See id.* at 131 (citing Joan S. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77-78 (2003)) (noting that although young women's and men's wages are roughly equal, mothers' wages are only sixty percent of the wages that fathers earn).

215. *See* H.R. REP. NO. 95-948, at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4751 (noting that the use of sex-based stereotyping in hiring results in women being stuck in "low-paying and deadend jobs").

216. *See In re* Carnegie Ctr. Assocs., 129 F.3d 290, 305 (3d Cir. 1997) (McKee, J., dissenting) (noting that the longstanding "fear that women would get pregnant and be absent from their jobs" was at least partially responsible for workplace discrimination against women).

217. *See id.* at 308 (noting that Title VII requires a causal nexus between the employer's state of mind and the protected trait and when the adverse employment action is based solely on pregnancy-related absence then the causal nexus "runs afoul of Title VII's prohibition of sex discrimination").

218. *See* Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994) (illustrating that the "similarly situated" standard requires the court to divide pregnancy and morning sickness, two concepts that are inextricably intertwined).

219. *See In re Carnegie Ctr. Assocs.*, 129 F.3d at 306 (noting that the employer's action in firing a woman because of her absence on maternity leave was functionally equivalent to firing her because she was pregnant).

opportunity dictate that the "similarly situated" standard is not the best tool to prevent employers from being allowed to act on stereotypes regarding women who are undergoing IVF.

Broad utilitarian considerations provide another reason for courts to use a more pragmatic approach to defining disparate treatment in situations where a woman is undergoing IVF. In 2003, thirty-three percent of women aged twenty-five to twenty-nine had a bachelor degree or more education compared with only twenty-nine percent of their male counterparts.[220] Because the current employment paradigm often does not support women in their capacity as caregivers, many women end up at home instead of in the work place, but that is typically after employment through a pregnancy.[221] These women at least have more time and security in their employment through the course of their pregnancies than women who must undergo aggressive fertility procedures like IVF. Cheryl Hall and women like her encounter resistance from their employers before they even face the question of whether they should "opt-out," and thus, it is likely that the market will lose their services sooner than even those women who become pregnant in the traditional way.[222] Sheer numbers dictate that quite a few women will be in the same predicament as Ms. Hall in the upcoming years.[223] The current judicial interpretation of disparate treatment does not protect these women, and as a result, the market will end up losing access to a high percentage of educated participants. [224] Therefore, not only is the statute amenable to a different approach to disparate treatment,[225] but society needs it if it is to tap into the education and skills of the population with the highest number of college educated members, women.

IV. ANALYTICAL CONNECTION: AN ANSWER TO THE "SIMILARLY SITUATED" PROBLEM

There is a better judicial approach to defining disparate treatment in Title VII cases where the plaintiff is undergoing IVF treatment. It is appropriate for both the U.S. Supreme Court and the lower courts to define disparate treatment in a unique way for Title VII plaintiffs involved in IVF treatment. A new approach to disparate treatment in this context, analytical connection analysis, better addresses the problem of disparate treatment in IVF cases. The contours of analytical connection analysis become clear through its application to a series of hypothetical situations involving a woman who suffers adverse employment

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220. *Facts for Features: Women's History Month*, U.S. Census Bureau, *available at* http://www.census.gov/Press-Release/www/2003/cb03-ff03.pdf.

221. Barnard & Rapp, *supra* note 6, at 132 (describing the "opt-out" phenomenon).

222. *See* Hall v. Nalco Co., 534 F.3d 644, 646 (7th Cir. 2008).

223. *See* Frequently Asked Questions: Infertility, *supra* note 2.

224. *See* Lisa Belkin, *Life's Work; For Women, the Price of Success*, N.Y. TIMES, Mar. 17, 2002, § 10, at 1 (noting that women increasingly must choose between "megawatt careers" and having children).

225. *See* sources cited *supra* note 192.

action because of her IVF status. Due to the nature of IVF treatment, the courts need a principled way to limit the application of analytical connection analysis in IVF cases, but such limits are available.

A. IVF Treatment Requires Its Own Test

Approaching the problem by evaluating the analytical connection between the employment action and the plaintiff's protected status is not perfect, but it is much truer to Congressional intent than the "similarly situated" standard in a situation involving enforcement of Title VII in a case where an employee is undergoing IVF treatment.[226] The analytical connection theory of disparate treatment is unique within the disparate treatment jurisprudence of Title VII. Typical *McDonnell Douglas* analysis requires a plaintiff to show that the employer treated employees who were not members of the protected group more favorably than the plaintiff even though those employees were "similarly situated" in their ability to work.[227] Asking whether non-protected employees were treated better than protected employees is a reasonable barometer for courts to use in determining whether an employer discriminated on the basis of race, religion, ethnicity, national origin, or even sex broadly on its face.[228] None of these protected classifications is analytically related to the employee's ability to work.[229] An African-American employee is just as capable as his Irish-American coworker is if both are similarly situated in their ability to work. Therefore, when the employer fires the African-American employee and promotes the Irish-American employee, the employer's action raises a permissible inference that the employer acted solely because of a protected characteristic, race.[230] This type of analysis works for every protected classification, except those that the PDA implicates.[231] Thus, in Title VII cases that do not rest on the PDA, no reason exists for a court to get into a consideration of the analytical connection between the employer's purported reason for the adverse employment action and the protected characteristic. It is enough in those situations that a court look to whether the employer treated non-protected employees who were similar in their

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226. *See In re* Carnegie Ctr. Assocs., 129 F.3d 290, 305-06 (3d Cir. 1997) (McKee, J., dissenting) (discussing the legal implications of the analytical connection test in the context of pregnancy based Title VII litigation).

227. *See* EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1191 (10th Cir. 2000) (noting that the fourth prong is whether the employer treated the employee less favorably than other employees not in the protected class but "similarly situated" in their ability or inability to work).

228. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-805 (1973) (discussing the test for determining disparate treatment outside of the pregnancy context).

229. *See In re Carnegie Ctr. Assocs.*, 129 F.3d at 304-05.

230. *See id.* at 306 (distinguishing disparate treatment in the pregnancy context from disparate treatment in any other Title VII context).

231. *See* 42 U.S.C. § 2000e (2006) (defining the protected classifications for the purposes of Title VII).

ability to work similarly to how it treated its protected employees.[232] In cases where the employee has the protection of Title VII because of her IVF status, the protected trait itself affects her ability to work.[233] The very nature of the protection that Title VII extends through the PDA is protection from discrimination because of a health status, and that is unique among the classes protected under Title VII.[234] Thus, it is appropriate for a court to make sure that it is giving the protected characteristic real consideration when it determines whether the employer subjected the employee to disparate treatment.[235] In order to do that, analytical connection analysis is necessary.

Further, the basic syllogism that allows the "similarly situated" standard to work for discrimination in Title VII cases where other protected classes are implicated might superficially function in IVF cases. But there is no true comparison group for women who are undergoing IVF treatment; so, the entire test falls apart upon closer inspection.[236] The "similarly situated" standard forces the court to reach for groups that are similar only in some respects to women who are undergoing IVF and then requires a court to infer the employer's intent from that imperfect analogy. It does not make sense to try to stretch the logic of the *McDonnell Douglas* test when the unique health-based characteristic at play in IVF cases allows a court to look directly at the protected characteristic and its analytical connection to the adverse employment action that the employer took against the employee.[237]

B. Analytical Connection: Its Origin and How It Works

If the courts are to realize the broad social mandate of the PDA,[238] then they must take a more pragmatic approach to defining disparate treatment in cases of adverse employment action based on IVF status.[239] The concept of analytical connection is helpful in considering the best way to approach defining disparate

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232. *See* Dandy v. United Parcel Serv., 388 F.3d 263, 272 (7th Cir. 2004) (applying the *McDonnell Douglas* analysis in a Title VII case in a context outside of the PDA).

233. *See In re Carnegie Ctr. Assocs.*, 129 F.3d at 306.

234. *Compare* Hall v. Nalco Co., 534 F.3d 644, 645-46 (7th Cir. 2008) (describing the health based protected characteristic) *with* 42 U.S.C. § 2000e(j)-(k) (defining the protected classifications for the purposes of Title VII).

235. *See In re Carnegie Ctr. Assocs.*, 129 F.3d at 306.

236. *See supra* Part II.A (describing IVF treatment); Manners, *supra* note 31, at 209-11 (illustrating the difficulty in finding a class of employees "similarly situated" to pregnant women).

237. *See In re Carnegie Ctr. Assocs.*, 129 F.3d at 308.

238. *See* Armstrong v. Flowers Hosp., Inc., 33 F.3d 1308, 1317(11th Cir. 1994) (noting that "[b]oth legislative history and relevant caselaw support a conclusion that Congress intended the PDA to end discrimination against pregnant employees").

239. *See In re Carnegie Ctr. Assocs.*, 129 F.3d at 304-07 (noting that the *Troupe* approach to disparate treatment, and others like it, removes a "substantial portion of the protection Congress intended" and suggesting that a broader analysis might be necessary in order to ensure that women receive all of the protection Congress intended the PDA to afford them).

treatment in a more pragmatic way for the purposes of PDA cases.[240] The idea for an analytical connection analysis comes from *Hazen Paper Co. v. Biggins*,[241] which the Supreme Court decided under the Age Discrimination in Employment Act (ADEA).[242] The ADEA is concerned with protecting employees over the age of forty from adverse employment action that employers might take against them based on stereotypes about their age.[243] In *Hazen Paper Co.*, a sixty-two-year-old man was fired just before his pension was about to vest.[244] The Court found that Hazen Paper fired Biggins because his pension was about to vest, and that was not *analytically* related to his age.[245] The Court stated, "[b]ecause age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age based.'"[246] Therefore, Hazen Paper's termination of Biggins was not unlawful under the ADEA.[247] The idea of an employer being able to take account of one concept and not logically ignore the other is the fundamental definition of analytical connection analysis,[248] and that is what makes it so useful for defining disparate treatment in IVF based PDA cases. An employer cannot consider IVF related absence from work for the purposes of employment decisions without considering IVF treatment itself, the protected characteristic.[249]

1. Analytical Connection or Cause in Fact?—Analytical connection analysis, though somewhat similar to cause in fact analysis, is not precisely the same.[250] Under analytical connection analysis, if an employer takes adverse employment action against a woman who is undergoing IVF treatment because of that IVF treatment or any of its directly related consequences, then the employer is acting against the woman because of her protected characteristic.[251] Put another way, if an effect flows directly from the woman's IVF status, then it is analytically connected to her IVF status such that it should be considered to

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240. *See id.* at 306.

241. 507 U.S. 604 (1993).

242. *See id.* at 611-12.

243. *See* 29 U.S.C. § 623(a)(1) (2006); *Hazen Paper Co.*, 507 U.S. at 608.

244. *Hazen Paper Co.*, 507 U.S. at 606, 611-12.

245. *Id.*

246. *Id.* at 611.

247. *Id.* at 611-12.

248. *See id.* 610-11.

249. *See In re* Carnegie Ctr. Assocs., 129 F.3d 290, 306 (3d Cir. 1997) (McKee, J., dissenting) (noting that "[p]regnancy and absence are not, however, analytically distinct, and an employer can not punish for the absence occasioned by pregnancy under Title VII. . . . [The protection afforded by the PDA] is meaningless unless it is intended to extend to the "temporary" absence from employment that is unavoidable in most pregnancies.") (internal quotes omitted).

250. *Compare Hazen Paper Co.*, 507 U.S. at 611-12 (applying analytical connection analysis), *with* RESTATEMENT (SECOND) OF TORTS § 9 cmt. b (1979) (explaining cause in fact analysis).

251. *Cf. Hazen Paper Co.*, 507 U.S. at 611-12.

legally be one in the same with her status as an IVF patient.[252]

A simple hypothetical is illustrative of the difference between analytical connection analysis and cause in fact analysis. Mrs. O'Leary's cow apocryphally kicked over a lantern and caused the Great Chicago Fire of 1871.[253] As a result of the fire, Mr. and Mrs. Brown quickly left their home, and on the way out, they forgot to lock the door. The fire did not harm Mr. and Mrs. Brown's home. Before the Browns got home, Mr. Smith made his way into their home through the unlocked door and broke his leg because he tripped on a loose board in the Brown's front room. The action of Mrs. O'Leary's cow is the *cause in fact* of Mr. Smith's broken leg.[254] If the cow had not caused the fire that spread and caused the Browns to panic and leave their home without locking the door, then Mr. Smith would never have been able to enter the Brown's home where he tripped on their loose floorboard. Therefore, in fact, Mrs. O'Leary's cow caused Mr. Smith's injury. However, Mrs. O'Leary's cow is not analytically connected to Mr. Smith's injury because Mr. Smith's injury does not directly relate and interconnect to the action of Mrs. O'Leary's cow.[255] Thus, analytical connection analysis is different from pure cause in fact analysis because it is limited to objective, direct consequences that result from the protected status instead of tracing the adverse employment action all the way back to its perhaps subjective cause.[256] Courts should carefully consider the reasons employers give for firing IVF patients. If the courts examined those reasons in relation to the IVF status of the plaintiff, they could uncover analytical connections that would illustrate that, unlike Mrs. O'Leary's cow and Mr. Smith's injury, the plaintiff's IVF status is tightly analytically connected to the reason the employer gave for taking adverse employment action against the plaintiff.[257] The "similarly situated" standard, however, would not afford these women protection.[258]

2. How It Works.—Both the "similarly situated" standard and analytical connection analysis require a court to make a decision about an employer's motivation, and that is hard.[259] However, the analytical connection test offers a

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252. *Cf. In re Carnegie Ctr. Assocs.*, 129 F.3d at 304-305.

253. *See* Thomas F. Schwartz, *Forward* to RICHARD F. BALES, THE GREAT CHICAGO FIRE AND THE MYTH OF MRS. O'LEARY'S COW 1, 1 (McFarland 2005) (noting that although initially thought of as the originator of the Great Chicago Fire, Mrs. O'Leary's cow is innocent). This example is the product of the imagination of the Author of this Note.

254. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 250 (explaining cause in fact analysis).

255. *See Hazen Paper Co.*, 507 U.S. at 611-12 (explaining analytical connection analysis).

256. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 250 (explaining cause in fact analysis).

257. *Cf. Hazen Paper Co.*, 507 U.S. at 611-12; *see also In re Carnegie Ctr. Assocs.*, 129 F.3d at 306 (applying analytical connection to absence related to morning sickness).

258. *Cf.* Troupe v. May Dep't Stores Co., 20 F.3d 734 (7th Cir. 1994) (upholding the legality of firing a pregnant woman for tardiness because of morning sickness).

259. *See generally* Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 492 (2006) (describing the difficulty

court a flexible approach to a fluid problem, which is a distinct benefit over the somewhat static "similarly situated" approach.[260] It also allows the court to look at the plaintiff's situation on its own merits instead of requiring a court to come up with a strained and imperfect comparison.[261] The distinction between form and function is paramount because of the uncertainty that surrounds the infertility treatment process.[262] The "similarly situated" standard could conceivably let employers get away with firing a woman upon the onset of her infertility treatment simply because of the uncertainty and potential cost to the employer associated with the woman's IVF status.[263] In order to implement analytical connection analysis in a case involving an IVF patient, a court must first examine the employer's asserted reason for the adverse employment action the employer took against the plaintiff.[264] To tease out the subtleties in the issues surrounding discrimination based on IVF, it is useful to look at a spectrum of examples and examine how the analytical connection theory of disparate treatment would apply in each case.

The most obvious case of illegal disparate treatment in a case involving an IVF patient is where the employee has clear evidence that the employer took adverse employment action against her simply because the employer had an ideological problem with IVF.[265] In this situation, the employer's action is based entirely on his or her own biases regarding IVF. The analytical connection between the adverse employment action that the employer took against the plaintiff and the plaintiff's status as an IVF patient is clear. The employer's ideological problem with IVF is inextricably linked to the adverse employment action that the employer took against the IVF patient.[266] Even under the

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of determining employer motivation when analyzing disparate treatment).

260. *Compare In re* Carnegie Ctr. Assocs., 129 F.3d 290, 305-06 (3d Cir. 1997) (McKee, J., dissenting) (applying analytical connection to the facts of *Troupe*), *with Troupe*, 20 F.3d at 735 (applying the "similarly situated" standard to the same facts).

261. *See* Manners, *supra* note 31, at 209-11 (illustrating the difficulty in finding a class of employees that are "similarly situated" to pregnant women).

262. *See* THE CORNELL ILLUSTRATED ENCYCLOPEDIA OF HEALTH, *supra* note 113, at 649 (noting that each embryo transfer in IVF treatment is around twenty-five percent successful).

263. *See* Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994) (defining the "similarly situated" standard in terms of expense the employee causes the employer).

264. *Cf.* Hazen Paper Co. v. Biggins, 507 U.S. 604, 611-12 (1993) (applying analytical connection analysis in the context of the Age Discrimination in Employment Act).

265. Title VII provides an exemption for religious corporations, associations, educational institutions, or societies such that it might not be illegal for a Roman Catholic school to fire a woman for undergoing IVF treatment in contravention of Church law. *See* 42 U.S.C. § 2000e-1(a) (2006); Church of Latter Day Saints v. Amos, 483 U.S. 327, 339 (1987) (upholding the constitutionality of the exception). *But see* Miller v. Bay View United Methodist Church, 141 F. Supp. 2d 1174, 1180 (E.D. Wis. 2001) (noting that these exempted organizations may not discriminate because of sex even though they may make religiously based employment decisions).

266. *Cf. In re* Carnegie Ctr. Assocs., 129 F.3d 290, 305 (3d Cir. 1997) (McKee, J., dissenting) (applying analytical connection to the facts of *Troupe*).

"similarly situated" standard, the action of this employer would be illegal because the employer undertook the adverse action solely because of the IVF treatment, and presumably, the employer would treat employees not undergoing IVF but "similarly situated" in their ability to work differently.[267]

The next situation might be a little less obvious. In this case, the IVF patient's doctor directs her to take three weeks off work in order to undergo her IVF procedure, and her employer takes adverse employment action against her based on her absence. In this situation, the IVF patient's absence is directly medically related to her IVF status, her protected characteristic.[268] Thus, the absence is analytically connected to the IVF patient's protected characteristic. Under the analytical connection analysis, a court would determine that the employer's action against this woman for her absence is tantamount to taking adverse employment action against her because of her IVF status.[269] Thus, the adverse employment action would be unlawful.[270] Yet, under a "similarly situated" test it is likely that any adverse employment action the employer takes against the IVF patient is legal.[271] As long as the employer would have taken a similar employment action against a male employee embarking on a leave of absence for a kidney transplant that is similar in type and duration, then the employer is within the bounds of the PDA under the "similarly situated" standard.[272] The problem is that Title VII does not protect kidney transplants, but it does protect IVF treatment.[273] Thus, the "similarly situated" standard does not ensure that the employer follows the law, but an analytical connection analysis does.

The final situation is the least clear. The IVF patient has been unsuccessful in her pursuit of pregnancy through IVF. As a result of her second cycle of

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267. *Cf. Troupe*, 20 F.3d at 738 (applying the "similarly situated" standard).

268. *See supra* Part II.A (describing IVF).

269. *See In re Carnegie Ctr. Assocs.*, 129 F.3d at 306 (noting that pregnancy and absence are not analytically distinct).

270. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 611-12 (1993) (applying analytical connection analysis in the context of the Age Discrimination in Employment Act); *In re Carnegie Ctr. Assocs.*, 129 F.3d at 305 (applying analytical connection to the facts of *Troupe*).

271. *See* Reeves v. Swift Transp. Co., 446 F.3d 637, 638, 642 (6th Cir. 2006) (finding no unlawful disparate treatment when a pregnant woman was denied light duty assignment because her pregnancy was not an injury sustained on the job); Spivey v. Beverly Enters., Inc., 196 F.3d 1309, 1311, 1314 (11th Cir. 1999) (finding no disparate treatment or disparate impact when a woman was terminated due to pregnancy induced physical limitations); Urbano v. Cont'l Airlines, Inc., 138 F.3d 204, 205, 207-08 (5th Cir. 1998) (finding that employer's denial of light duty assignment to a woman limited in her physical ability due to pregnancy was not unlawful); *Troupe*, 20 F.3d at 738 (finding that an employer's termination of a woman due to either lateness because of her morning sickness or a fear that she would not return after her maternity leave was not unlawful).

272. *See Troupe*, 20 F.3d at 738 (noting that as long as similar action is taken against employees similar in their expense there is no unlawful discrimination).

273. *See* 42 U.S.C. § 2000e (2006) (protecting pregnancy and medically related conditions as part of the definition of sex under Title VII but no other health based traits).

treatment, she medically requires a second leave of absence.[274] The problem in this example is whether a court should carry the analytical connection analysis through to a second round of IVF. In this instance, the court needs to make a policy decision because Congress did not mean for the PDA to confer a benefit on women who fell into its definition.[275] As a result, a question exists whether the employee's absence is more about her choice to pursue a strategy to achieve pregnancy that has proved unsuccessful, or her protected IVF status.[276] A court that applied the "similarly situated" standard might analogize this employee to an athlete who has to continuously rehab a knee injury, which requires the knee patient to take repeated leaves from work.[277] Under the "similarly situated" standard, if the employer would take adverse employment action against the knee patient for his absences, then the employer could legally take adverse employment action against the repeat IVF patient.[278] Because courts must avoid conferring a special benefit on the employee, it is appealing to use the "similarly situated" standard as the preferred judicial approach in repeat IVF cases. In a repeat IVF case, the analytical connection might be strongest between the adverse employment action and the woman's choice to pursue a medical strategy that is failing. The "similarly situated" standard provides courts with a way to allow the employer to fire this woman with few questions.[279] However, the woman's choice still puts her in a position where she exhibits a protected characteristic, IVF status. Thus, it should not be a foregone conclusion that her employer can fire her with impunity.

C. A Method for the Courts to Distinguish Between Unlawful Employment Action and Judicially Conferred Benefits

The analytical connection analysis may not be as satisfying as a brightline test. But the "similarly situated" standard does not offer a brightline solution either because there is no clear comparison group for women who are undergoing IVF.[280] Further, the analytical connection model provides the IVF patient with at least one clear protected opportunity to pursue IVF treatment, and because of that opportunity, it is more faithful to Congressional intent than the "similarly

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274. *See* THE CORNELL ILLUSTRATED ENCYCLOPEDIA OF HEALTH, *supra* note 113, at 649 (noting that IVF has a twenty-five percent success rate for each attempted embryo transfer).

275. *See* H.R. REP. NO. 95-948, at 3-4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4751-52 (1978) (noting that the PDA was not intended to confer additional benefits on pregnant women).

276. *Cf. In re* Carnegie Ctr. Assocs., 129 F.3d 290, 306 (3d Cir. 1997) (McKee, J., dissenting) (noting that pregnancy and absence are not analytically distinct).

277. *See Troupe*, 20 F.3d at 738 (noting that a man undergoing a kidney transplant might be an appropriate comparison for a woman leaving on maternity leave).

278. *See id.*

279. *See id.*

280. *See* Manners, *supra* note 31, at 209-11 (noting the difficulty in finding a class of employees that are "similarly situated" to pregnant women).

situated" standard.[281] However, when it enacted the PDA, Congress did not want it to confer additional benefits to the women protected by the PDA.[282] Therefore, a line must exist where the woman's absence is less directly related to her IVF status and more directly related to her choice to continue to pursue IVF treatment. The uncertainty that surrounds the IVF procedure is not just a problem for the woman undergoing it, but it is a problem for her employer and the courts.[283] Thus, the court must engage in some amount of interest balancing in order for it to determine what disparate treatment looks like in repeat IVF cases.

An employer's primary interest at stake in these cases is maintaining an economically feasible business.[284] In fact, the employer's economic interest is so important that it has been some courts' primary consideration in determining the nature of disparate treatment in cases that involve the PDA.[285] PDA cases that involve IVF treatment demand a particularly stringent examination of the interests of the employer because of the uncertainty that is attendant to the entire fertility treatment undertaking.[286] To avoid conferring a benefit on the employee who is undergoing IVF, it is important to draw a line at the protection that the PDA affords her. The analytical connection between the employee's behavior and the protected characteristic is so strong in the first instance of the IVF related behavior, that the employer should have no legal choice but to refrain from acting against the employee's behavior.[287] In that instance, any adverse employment action that the employer takes against the employee based on her IVF status would contravene the statutory requirement that it not take any adverse employment action against an employee because of her protected characteristic.[288]

However, if the employee chooses to undergo successive IVF treatments that necessitate more and more absence, the court must be able to point to a place in time where the strongest analytical connection is between the employee's behavior and the employee's inefficient choice to continue to pursue pregnancy through aggressive fertility treatment.[289] In those cases, courts should shift the burden of proof to the employer after the employee establishes her prima facie

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281. *See In re Carnegie Ctr. Assocs.*, 129 F.3d at 307.

282. *See* H.R. REP. NO. 95-948, at 3-4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4751-52.

283. *See, e.g.*, *Troupe*, 20 F.3d at 738 (noting that cost is important to employers).

284. *See id.* (noting that businesses have an interest in economic feasibility).

285. *See, e.g.*, *id.* (defining the "similarly situated" standard in terms of expense to the employer).

286. *See supra* Part II.A.

287. *See In re* Carnegie Ctr. Assocs., 129 F.3d 290, 305-08 (3d Cir. 1997) (McKee, J., dissenting) (applying analytical connection analysis to an employee's pregnancy based absence).

288. *See id.*

289. The employee who chooses to undergo IVF treatment for yet another time is more like an employee whose pension is vesting because of years of service than the employee who is undergoing IVF for the first time who is more like the employee whose pension is vesting because of age. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 611-12 (1993).

case of analytical connection. The employer should have the opportunity to put forward the same business necessity defense that is available for other violations of the statute.[290] This defense is a narrow one that generally consists of the employer putting forth evidence that shows that the adverse employment action is essential for the safety and efficiency of the employer's business.[291] Further, the employer must show that it had no less discriminatory alternative to the adverse employment action.[292] The courts simply must allow a showing of this defense as a matter of convention in this new type of case. In this way, courts can take care of the economic interests of the employer by allowing the employer to assert its essential interests, and courts can afford the employee the protection that the statute requires. Thus, the woman is not forced into a difficult position where she has to prove intent but has little access to the evidence.[293] Additionally, courts are not forced to find a "similarly situated" group when a perfect one does not likely exist because of the unique problems associated with IVF treatment.[294]

CONCLUSION

The Seventh Circuit correctly extended the umbrella of PDA protection to women who are undergoing IVF.[295] However, that extension of protection presents problems for the current judicial structure for dealing with disparate treatment claims under Title VII. Congress intended the PDA to end all employment discrimination against women.[296] The "similarly situated" standard contravenes the purpose of Congress in enacting the PDA in the IVF context because it allows the courts to avoid analyzing the actual basis for the employer's adverse employment action.[297] Analytical connection analysis presents a workable approach to disparate treatment because it cuts to the heart of the employer's action and provides the plaintiff with the protection Congress promised, but it does not require courts to allow the employee infinite bites at the apple.

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290. *See generally* James O. Pearson Jr., Annotation, *What Constitutes "Business Necessity" Justifying Employment Practice Prima Facie Discriminatory Under Title VII of the Civil Rights Act of 1964*, 36 A.L.R. FED. 9 (1978) (describing the parameters and application of the business necessity defense).

291. *See id.*

292. *See id.*

293. *See supra* note 71 and accompanying text.

294. *See* Manners, *supra* note 31, at 209-11 (illustrating the difficulty in finding a class of employees that are "similarly situated" to pregnant women).

295. *See* UAW v. Johnson Controls, Inc., 499 U.S. 187, 198 (1991).

296. *See* Armstrong v. Flowers Hosp., Inc., 33 F.3d 1308, 1317 (11th Cir. 1994) (noting that "[b]oth history and relevant caselaw support a conclusion that Congress intended the PDA to end discrimination against pregnant employees").

297. *See* Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994) (holding that it is legal to fire a woman because of absenteeism caused by morning sickness).

POST-*GEORGIA V. RANDOLPH*: AN OPPORTUNITY TO RETHINK THE REASONABLENESS OF THIRD-PARTY CONSENT SEARCHES UNDER THE FOURTH AMENDMENT

DANIEL E. PULLIAM*

INTRODUCTION

When police entered Kevin Henderson's southwest Chicago home on an autumn Sunday morning, he greeted them with profanity-laced instructions to leave.[1] Minutes later, the officers hauled him to jail for domestic battery.[2] Henderson's wife, Patricia, signed a consent-to-search form and led the officers to the home's attic.[3] The warrantless search turned up an assortment of narcotics, drug paraphernalia, and a variety of weapons in the attic, including an AR-15 automatic assault rifle and live ammunition, and a machete, a crossbow, additional ammunition, and an explosive device in the basement.[4] Prosecutors charged Kevin with possessing with intent to distribute narcotics and possessing weapons as a felon.[5]

Consent searches as illustrated above implicate practical values as significant as nearly any other in Fourth Amendment jurisprudence and are likely law enforcement's prevailing method of conducting warrantless searches.[6] The U.S. Supreme Court has long deemed warrantless third-party consent searches reasonable for Fourth Amendment purposes,[7] and until 2006, the Court steadily

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1. United States v. Henderson, No. 04 CR 697, 2006 U.S. Dist. LEXIS 88404, at *1-2 (N.D. Ill. Nov. 29, 2006), *reversed*, 536 F.3d 776, 777 (7th Cir. 2008); *see also* Marc McAllister, *What the High Court Giveth the Lower Courts Taketh Away: How to Prevent Undue Scrutiny of Police Officer Motivations Without Eroding* Randolph*'s Heightened Fourth Amendment Protections*, 56 CLEV. ST. L. REV. 663, 686-87 (2008) (discussing the district court's suggestion that the testifying officers altered their story regarding Henderson's salutation).

2. *Henderson*, 2006 U.S. Dist. LEXIS 88404, at *2.

3. *Id.*

4. *Id.* at *2-3.

5. *Id.* at *4.

6. *See* JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 261 n.5 (4th ed. 2006) (citing RICHARD VAN DUIZEND ET AL., THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES 21 (1984) for the statistic that ninety-eight percent of warrantless searches are consent searches).

7. *See* United States v. Matlock, 415 U.S. 164, 171, 172 n.7 (1974); Charles R. Johnson, Recent Case, Henry v. Commonwealth, *175 S.E.2d 416 (Va. 1970)*, 39 U. CIN. L. REV. 807, 808 (1970) (noting that third-party consent doctrine is "an anomalous doctrine").

broadened this exception to the warrant requirement.[8] The Court has used a two-prong rationale in upholding third-party consent searches: (1) individuals who share a residence or an automobile assume the risk that the co-occupant could allow a search; and (2) a co-occupant has authority to consent in their own right.[9]

Yet in 2006 the Court seemed to reverse course in *Georgia v. Randolph*.[10] A five-justice majority held that a co-occupant could not validly consent when another co-occupant: (1) is physically present; and (2) expressly refuses to consent at the home's entrance.[11] Soon after *Randolph*, critics predicted police would simply remove non-consenting co-occupants, despite the Court's suggestion in dicta that such tactics were impermissible.[12] Kevin's removal, along with other similar cases, illustrates the fulfillment of these predictions.[13]

But courts have diverged and the circuit courts of appeals are split over whether *Randolph* bars searches when police obtain consent to search from a third-party in the absence of the non-consenting party.[14] The circuit split provides the Court with an opportunity to revisit and rejuvenate this maligned doctrine,

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8. *See* Florida v. White, 526 U.S. 559, 569 (1999) (Stevens, J., dissenting) (noting that "exceptions have all but swallowed the [Fourth Amendment's] general rule" requiring warrants); Illinois v. Rodriguez, 497 U.S. 177, 198 (1990) (Marshall, J., dissenting) (allowing persons with mere apparent authority to consent to searches purges "some of the liberty" protected by the Fourth Amendment).

9. DRESSLER & MICHAELS, *supra* note 6, at 273.

10. Georgia v. Randolph, 547 U.S. 103, 121-22 (2006); *see* C. Dan Black, Note, Georgia v. Randolph*: A Murky Refinement of the Fourth Amendment Third-Party Consent Doctrine*, 42 GONZ. L. REV. 321, 334 (2007) (noting that *Randolph* provides a "much needed refinement"). *But see* McAllister, *supra* note 1, at 668 (concluding that *Randolph* is not a "watershed case").

11. *Randolph*, 547 U.S. at 122-23.

12. *Id.* at 121-22. See Stephanie M. Godfrey & Kay Levine, *Much Ado About* Randolph*: The Supreme Court Revisits Third Party Consent*, 42 TULSA L. REV. 731, 748 (2007), for the prediction that police would relocate a search's target to avoid *Randolph*'s holding. *See also* Andrew Fiske, *Disputed-Consent Searches: An Uncharacteristic Step Toward Reinforcing Defendants' Privacy Rights*, 84 DENV. U. L. REV. 721, 735 (2006) (arguing that *Randolph* incentivizes police to remove occupants "most likely to refuse a search").

13. *See* United States v. Henderson, 536 F.3d 776, 777-78 (7th Cir. 2008), *cert. denied*, No. 08-9834, 2009 WL 1043883 (U.S. Oct. 5, 2009); *see also* United States v. Travis, 311 F. App'x 305, 310 (11th Cir. 2009) (holding that Travis's arrest was not for the purpose of avoiding his "possible objection"); United States v. McKerrell, 491 F.3d 1221, 1228-29 (10th Cir. 2007) (holding that there was no evidence police arrested McKerrell to avoid objections); United States v. Alama, 486 F.3d 1062, 1066-67 (8th Cir. 2007) (rejecting a claim that officers arrested Alama to avoid objections); United States v. Parker, 469 F.3d 1074, 1078-79 (7th Cir. 2006) (noting that although police arrested Parker before requesting a co-occupant's consent, there was no evidence they arrested him to coerce consent).

14. *See Henderson*, 536 F.3d at 783 (noting that Henderson's case, *United States v. Hudspeth*, 518 F.3d 954 (8th Cir. 2008) (en banc) and *United States v. Murphy*, 516 F.3d 1117 (9th Cir. 2008) are "materially indistinguishable" based on the case's facts); cases cited *supra* note 13; discussion *infra* Part IV.A.

and *Randolph* opens the door for the Court to restore meaning to co-occupants' rights to be secure "against unreasonable searches and seizures."[15]

This Note first analyzes the Fourth Amendment's history of protecting liberty and the development of third-party consent search doctrine. Part II examines *Randolph*, its undercutting of existing third-party consent doctrine, and lower courts' responses. Part III proposes a new approach for determining the reasonableness of third-party consent searches that endeavors to better support Fourth Amendment liberties.

I. DIMINISHING FOURTH AMENDMENT RIGHTS: "NOTHING NEW UNDER THE SUN"[16]

Over the centuries, legal systems have treated the right to be free from unreasonable government searches as anything but a jealously guarded liberty.[17] Government officials operating in societies ostensibly governed by the rule of law have authorized unfettered searches and seizures since the 1500s.[18] Even after the courts and society recognized the danger of unrestricted searches, abuses continued to the extent that when thirteen of Great Britain's North American colonies declared independence, the revolution's leaders instituted limits on their government's search and seizure powers.[19] But U.S. courts have failed to consistently guard this liberty, particularly in its third-party consent doctrine.[20]

A. A Brief History of Fourth Amendment Liberties

The mid-sixteenth-century Tudor dynasty used broad search and seizure

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15. U.S. CONST. amend. IV; *see* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994) (offering that Fourth Amendment law "is an embarrassment"); Thomas P. Crocker, *From Privacy to Liberty: The Fourth Amendment After* Lawrence, 57 UCLA L. REV. 1, 3-4 (2009) (proposing that the Supreme Court's "emphasis on liberty" in *Lawrence v. Texas*, 539 U.S. 558 (2003), "provides a fruitful way of reorienting Fourth Amendment protections when considering particular kinds of interpersonal relationships" for the purposes of re-considering the Court's third-party consent doctrine).

16. *Ecclesiastes* 1:9 (New King James Version) ("That which has been is what will be, That which is done is what will be done, And there is nothing new under the sun.").

17. *See* FREDRICK SEATON SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476-1776: THE RISE AND DECLINE OF GOVERNMENT CONTROL 82 (1956).

18. *See id.*

19. *See* U.S. CONST. amend. VI; *see also* Godfrey & Levine, *supra* note 12, at 732 (noting that "the British government's willingness to abandon [principles] for its own ends convinced the framers that more proactive steps were necessary to prevent similar abuses").

20. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 288-90 (1973) (Marshall, J., dissenting) (arguing "police always have the upper hand" in consent searches); Note, *Retreat: The Supreme Court and the New Police*, 122 HARV. L. REV. 1706, 1726 n.128 (2009) (noting that both *Randolph* and the Court's 1966 decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), "place[d] limits on police, but not on their discretion. They both create procedural hurdles, but once clear of them, police can largely act as they see fit").

powers to control printing presses.[21] Queen Mary I chartered a printing company with powers to "search whenever it shall please them in any place, shop, house, chamber, or building of any printer, binder or bookseller."[22] The system experienced some success, but within decades, the government's power diminished and individuals demanded "to see, to hear, and to know."[23] But nearly a century later, Parliament attempted to censor printers who criticized the legislative body by ordering searches and seizures.[24] The printers resisted, and after decades of suppression, efforts to control the press through search and seizure lost practical effectiveness as the searches' targets successfully obtained arrest warrants against the searchers through common-law courts.[25]

British common law ultimately evolved to where authorities could only grant search warrants "for stolen goods," and courts deemed warrants "obnoxious" if they were not particularized as to the location.[26] In 1604 in *Semayne's Case*,[27] Sir Edward Coke famously said, "the house of every one is to him as his castle and fortress, as well for his defence against injury and violence as for his repose."[28] Nevertheless, the British readily discarded these principles for the convenience of government officials.[29] The "general warrant" granted government officers an expansive authority to search and seize an indeterminate number of persons and items and was the "most powerful legal weapon" against government critics.[30] British authorities used this legal bludgeon to have "the secret cabinets and bureaus . . . thrown open to . . . search and inspection . . . whenever the secretary of state [thought] fit to charge, or even to suspect, a person . . . of a seditious libel."[31] Lord Chief Justice Pratt planted the seeds of the Fourth Amendment in 1763 when he recognized that the general warrant's power subverts liberty.[32]

The British government's abuses prompted Revolutionary leaders to enshrine protections against such abuses in a Bill of Rights.[33] John Adams reported that the Boston merchants' 1761 attempt to block new writs of assistance sparked the

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21. SIEBERT, *supra* note 17, at 82.

22. *Id.* at 82 (citing I A TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS OF LONDON 1554-1640 xxxi (Edward Arber ed., 1950)).

23. *Id.* at 86-87.

24. *Id.* at 175.

25. *Id.* at 175-177.

26. Davis v. United States, 328 U.S. 582, 603-04 (1946) (Frankfurter, J., dissenting).

27. 77 Eng. Rep. 194, 195 (K.B. 1604).

28. *Id.* (instituting the "knock and announce" rule).

29. Godfrey & Levine, *supra* note 12, at 732-33.

30. Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1369 (1983); *see* BLACK'S LAW DICTIONARY 1723 (9th ed. 2009).

31. United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 327-28 (1972) (Douglas, J., concurring) (quoting Entick v. Carrington, 19 How. St. Tr. 1029, 1063, 95 Eng. Rep. 807 (K.B. 1765)).

32. Stewart, *supra* note 30, at 1370.

33. Godfrey & Levine, *supra* note 12, at 732-33.

"flame of fire," which bore "the Child Independence" that fifteen years later "grew up to manhood, and declared himself free."[34] At George Washington's urging, Congress passed a Bill of Rights that contained the Fourth Amendment,[35] which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[36]

The academy continues to debate the Fourth Amendment's original meaning.[37] Often forgotten is that past generations considered its protections "[s]o basic to liberty" that every state adopted its own version.[38] Yet scholars observe that the erosion of Fourth Amendment liberties in favor of police convenience produces "frightening" semblances of the despised general warrants that prompted the adoption of the Fourth Amendment.[39]

B. Early American Search and Seizure Jurisprudence

The leading search and seizure case is *Boyd v. United States*,[40] in which the U.S. Supreme Court held that "compulsory extortion" of a person's "private papers to be used as evidence to convict him" is no different from forcing individuals to testify against themselves in violation of the Fifth Amendment.[41] The Court, in language long substantively disregarded, recognized that "the [F]ourth and [F]ifth [A]mendments run almost into each other" with regard to

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34. 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.1 (4th ed. 2009) (citing and quoting 10 C. ADAMS, THE LIFE AND WORKS OF JOHN ADAMS 247-48 (1856)). A Writ of assistance was a legal device customs officials used to search for smuggled products in buildings. *Id.*

35. *Id.*

36. U.S. CONST. amend. IV. See James B. White, *The Fourth Amendment as a Way of Talking About People: A Study of* Robinson *and* Matlock, 1974 SUP. CT. REV. 165, 172 n.14 (1974), who notes that the House's version of the Amendment differed from what the Senate ratified and the States' adopted, diminishing arguments that the framers found significance in the precise wording.

37. For an extensive Fourth Amendment analysis, see Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 552 (1999), who argues that the modern understanding of the Fourth Amendment is the product of unanticipated developments.

38. *See* Davis v. United States, 328 U.S. 582, 604 (1946) (Frankfurter, J., dissenting).

39. *See* Nancy J. Kloster, Note, *An Analysis of the Gradual Erosion of the Fourth Amendment Regarding Voluntary Third Party Consent Searches: The Defendant's Perspective*, 72 N.D. L. REV. 99, 123 (1996).

40. 116 U.S. 616 (1886); *see* Carroll v. United States, 267 U.S. 132, 147 (1925) (noting that *Boyd* is the leading case on search and seizure); *see also In re* January 1976 Grand Jury, 534 F.2d 719, 724 (1976) (same).

41. *Boyd*, 116 U.S. at 630.

searches and forcibly extorting testimony from criminal suspects.[42] *Boyd* and *Mapp v. Ohio*,[43] where the Court applied the exclusionary rule to state courts through the Fourteenth Amendment's Due Process clause, raised the Fourth Amendment from "a dead letter."[44]

One of the Court's first consent search cases was *Amos v. United States*.[45] Here, the Court rejected an argument that when a suspect's wife granted police access to the home she shared with the suspect, she "waived" the suspect's constitutional rights.[46] But in *Davis v. United States*,[47] the Court held that a willing consent made a warrantless search reasonable under the Fourth Amendment.[48] In *Davis*, Justice Douglas distinguished *Amos* by noting that the search occurred in public during business hours and not in a private residence.[49] In dissent, Justice Frankfurter strongly objected to law enforcement's ability to skirt the limits of the warrant requirement by obtaining consent, reasoning that the Constitution did not "make it legally advantageous not to have a warrant, so that the police may roam freely" in search of evidence.[50]

Officers regularly seek consent for convenience's sake in lieu of getting a warrant.[51] Police perform over ninety percent of warrantless searches using consent.[52] Law enforcement talk openly about consent searches' benefits. One officer went so far as to state that officers are encouraged "to try to talk their way

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42. *Id.*; *see* Schneckloth v. Bustamonte, 412 U.S. 218, 246-47 (1973) (noting that *Miranda*'s rational, where statements obtained from a defendant unaware of his rights violated the Fifth Amendment privilege against self-incrimination, did not apply to consent searches).

43. 367 U.S. 643, 655 (1961). A main purpose of the rule is to deter police from excessive searches. *See* LAFAVE, *supra* note 34, § 1.1. Scholars criticize the rule because of the "pressure" to reduce the rule's reach. *See* James Boyd White, Comment, *Forgotten Points in the 'Exclusionary Rule' Debate*, 81 MICH. L. REV. 1273, 1281 (1983) (noting that courts do not administer the rule sensibly).

44. *Mapp*, 367 U.S. at 670 (Douglas, J., concurring) (citing Wolf v. Colorado, 338 U.S. 25, 47 (1949) (Rutledge, J., dissenting)); Abel v. United States, 362 U.S. 217, 255 (1960) (Brennan, J., dissenting).

45. 255 U.S. 313 (1921); *see* George C. Thomas III, *Terrorism, Race and a New Approach to Consent Searches*, 73 MISS. L.J. 525, 545 (2003) (noting that *Amos* is the earliest consent search case).

46. *Amos*, 255 U.S. at 317 (declining to consider whether the wife could waive her absent husband's constitutional rights because it was "perfectly clear" she was coerced).

47. 328 U.S. 582 (1946).

48. *Id.* at 593. The District Court did not believe Davis's claim that the agents "threatened to break down the door" if he did not provide them access. *Id.* at 586-87.

49. *Id.* at 592.

50. *Id.* at 595 (Frankfurter, J., dissenting).

51. 4 LAFAVE, *supra* note 34, § 8.1.

52. DRESSLER & MICHAELS, *supra* note 6, at 261 n.5 (citing VAN DUIZEND, *supra* note 6, at 21); Paul Sutton, *The Fourth Amendment in Action: An Empirical View of the Search Warrant Process*, 22 CRIM. L. BULL. 405, 415 (1986).

into a search."[53] But according to the New Jersey Attorney General's Office, consent searches are not effective because most "do not result in a positive finding" of criminal activity.[54] Consent searches encourage distrust of the judicial system, and no one has empirically validated the claim that consent searches produce efficient results.[55]

Critics condemn consent searches arguing that no one would consent willingly to a search that uncovers criminal activity.[56] Courts exalt the form of a person's consent—an expression of words that seem to suggest consent despite the circumstances—over a genuine consent.[57] In *Schneckloth v. Bustamonte*,[58] in which the Court held that the State did not have to demonstrate that an individual had knowledge of the right to refuse consent to a warrantless search,[59] Justice Thurgood Marshall said in dissent that consent searches permit a "game of blindman's buff, in which the police always have the upper hand, for the sake of nothing more than the convenience of the police."[60] Justice Douglas, in his own dissent, noted that reasonable individuals might "read an officer's 'May I' as the courteous expression of a demand backed by force of the law."[61] Some scholars have called for a "per se ban on" the use of consent searches.[62] Others have

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53. Kate Shatzkin & Joe Hallinan, *Highway Dragnets Seek Drug Couriers—Police Stop Many Cars for Searches*, SEATTLE TIMES, Sept. 3, 1992, at B6. *See* Kathy Barrett Carter, *Senate Panel to Look at Profiling Bans*, STAR-LEDGER, May 9, 2002, at 45 (quoting former New Jersey Governor James E. McGreevey describing consent searches as "valuable" police tools).

54. PETER VERNIERO & PAUL H. ZOUBEK, OFFICE OF THE ATT'Y GEN. OF THE STATE OF N.J., INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING 28 (1999), http://www.state.nj.us/lps/intm_419.pdf.

55. Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 260 (2001) (noting that the "magnitude of [the police's] interests are unclear").

56. *See id.* at 211-12 (arguing that "most people don't willingly consent"); JAY-Z, *99 Problems*, *on* THE BLACK ALBUM (Roc-A-Fella/Def Jam 2004) ("'Well, do you mind if I look round the car a littl' bit?' . . . And I know my rights so you gon' need a warrant for that . . . Nah, I ain't pass the bar but I know a little bit. Enough that you won't illegally search my shit.").

57. *See* Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 56-57 (1974) (noting that little weight should be given to a person's consent "if he extends the invitation to a policeman sitting on his chest and pounding his head on the steps").

58. 412 U.S. 218 (1973).

59. *Id.* at 248-49. The Court also held that the State must demonstrate that the consent was granted voluntarily and not the product of express or implied duress or coercion. *Id.* at 248.

60. *Id.* at 289-90 (Marshall, J., dissenting).

61. *Id.* at 275-76 (Douglas, J., dissenting) (citing Bustamonte v. Schneckloth, 448 F.2d 699, 701 (9th Cir. 1971)). Justice Douglas seems less excited about consent searches in *Schneckloth* than he was as the author of the majority in *Davis v. United States*, 328 U.S. 582, 593-94 (1946). *See supra* notes 47-49 and accompanying text.

62. *See* Strauss, *supra* note 55, at 271. *But see* Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 562 (2009); Note, *The Fourth Amendment and Antidilution: Confronting the Overlooked Function of the Consent Search Doctrine*, 119 HARV. L. REV. 2187, 2197-98 (2006) (arguing consent searches gives people "power to stand up for their own rights").

called for the elimination of consent searches in only specific situations.[63]

C. Third-Party Consent: Undermining Fourth Amendment Liberty Protections

Third-party consent searches draw on an ancient tactic employed by government officials to implicate individuals in crime.[64] One of the earliest recorded third-party consent searches occurred when Joseph, Egypt's overseer, ordered his steward to plant his silver goblet in his youngest brother's food bag.[65] As the brothers left Egypt, the steward stopped and accused them of goblet theft.[66] The brothers, astonished by the accusation, consented to a search and promised to be Joseph's slaves if the steward found the goblet in their belongings.[67] The text does not suggest whether the youngest brother objected, or whether he knew the silver goblet was in his sack, but the goblet's discovery provides an example of how third-party consent could cause harsh consequences.[68] The brothers returned to face their brother, but fortunately for them, Joseph maintained the ruse only temporarily.[69] For individuals in U.S. criminal justice systems, third-party consent searches have lasting consequences not likely contemplated when individuals agree to share property with their roommate, friend, or spouse.

The Supreme Court has paid little attention to third-party consent searches, despite their controversial nature.[70] Initially, the Court seemed reluctant to sanction third-party consent searches.[71] In *Chapman v. United States*,[72] the Court rejected landlord-tenant law as a means to decide whether an owner's consent to a search of a tenant's home made the search valid.[73] The Court held that allowing warrantless searches under a property owner's authority reduced "the Fourth Amendment to a nullity," as tenants' privacy would be subject to an owner's

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63. Christo Lassiter, *Eliminating Consent from the Lexicon of Traffic Stop Interrogations*, 27 CAP. U. L. REV. 79, 133-34 (1998).

64. *See Genesis* 44:1-13.

65. *Id.* at 1-21; *see* ALAN M. DERSHOWITZ, THE GENESIS OF JUSTICE: TEN STORIES OF BIBLICAL INJUSTICE THAT LED TO THE TEN COMMANDMENTS AND MODERN MORALITY AND LAW 186-87 (2000).

66. *Genesis* 44:6.

67. *Id.* at 8-9.

68. *Id.* at 11-12 ("Then each man speedily let down his sack to the ground, and each opened his sack. So he searched.") (New King James Version).

69. *Id.* at 44:13-45:1.

70. *See* 4 LAFAVE, *supra* note 34, § 8.3; *see also* Note, *Consent Searches: A Reappraisal After* Miranda v. Arizona, 67 COLUM. L. REV. 130, 148 (1967) (noting that co-occupant consent search admissibility problems are "most perplexing").

71. *See* 4 LAFAVE, *supra* note 34, § 8.3.

72. 365 U.S. 610 (1961). *Chapman* was the first third-party consent case since *Amos* forty years earlier. *See* 4 LAFAVE, *supra* note 34, § 8.3; *supra* notes 45-50 and accompanying text.

73. *Chapman*, 365 U.S. at 612, 617.

discretion.[74] But since the 1960s, the Court has framed Fourth Amendment liberties as a tension between privacy rights and the fact that individuals surrender some of those rights by sharing property.[75]

In *Stoner v. California*,[76] the Court held that the Fourth Amendment protects hotel guests against searches of their rooms despite a desk clerk's consent.[77] The Court concluded that Fourth Amendment rights would not "be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.'"[78] The Court held that only the hotel guest's rights were at stake, and thus, only the guest could waive that right.[79] Legal scholars have noted that *Stoner* "could have sounded the death knell" of third-party consent searches if lower courts interpreted the decision to hold that third-party consent searches were valid only if "the consenting party was actually an agent of the nonconsenting party."[80] But in *Frazier v. Cupp*,[81] the Supreme Court adjusted its approach by launching the assumption of risk theory.[82]

Since the 1974 decision in *United States v. Matlock*,[83] the Supreme Court has held that a co-occupant's consent validates warrantless entries and searches.[84] Police arrested Matlock in the front yard of a home he rented with his girlfriend.[85] The officers knew that Matlock lived there, but did not ask him if they could search.[86] Instead, Matlock's girlfriend, wearing a robe and holding her son, allowed the officers to search, which turned up $4,995 in a diaper bag.[87]

In abandoning *Stoner*,[88] the Court held that consent from an individual

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74. *Id.* at 617 (quoting Johnson v. United States, 330 U.S. 10, 14 (1948) (alteration omitted)).

75. *See* Comment, *Third Party Consent to Search and Seizure*, 33 U. CHI. L. REV. 797, 810 (1966); *see also* John D. Castiglione, *Human Dignity Under the Fourth Amendment*, 2008 WIS. L. REV. 655, 659 (2008) (noting that reasonableness analysis has "devolve[d] into little more than an awkward balancing exercise between the needs of law enforcement and the interests of privacy").

76. 376 U.S. 483 (1964).

77. *Id.* at 488-89.

78. *Id.* at 488.

79. *Id.* at 489.

80. *See* Steven H. Bow, Case Comment, *Relevance of the Absent Party's Whereabouts in Third Party Consent Searches*, 53 B.U. L. REV. 1087, 1104 (1973); Comment, *supra* note 75, at 801-03 (describing the agency principles as applied in the third party consent context).

81. 394 U.S. 731 (1969).

82. *Id.* at 740 (holding that people assume "the risk" that a third party will allow someone else to search shared property). The Court did not have to overrule *Stoner* because the police wanted to search a bag they believed the consenting party owned. 4 LAFAVE, *supra* note 34, § 8.3.

83. 415 U.S. 164 (1974); *see* Sharon E. Abrams, Comment, *Third-Party Consent Searches, the Supreme Court, and the Fourth Amendment*, 75 J. CRIM. L. & CRIMINOLOGY 963, 964 (1984) (noting that *Matlock* was the Court's first third-party consent case).

84. *See Matlock*, 415 U.S. at 171; *see also* U.S. CONST. amend. IV.

85. *Matlock*, 415 U.S. at 166.

86. *Id.*

87. *Id.* at 166-67.

88. 4 LAFAVE, *supra* note 34, § 8.3.

possessing "common authority" justifies warrantless searches.[89] In a footnote, the Court adopted a two-prong rule.[90] First, "common authority" could not be based on a "mere property interest [that] a third party has in the property."[91] Instead, the Court based "common authority" on "mutual use of the property by persons generally having joint access or control for most purposes."[92] The "common authority" made reasonable a co-occupant's consent to the search "in his own right."[93] Second, the Court recognized that co-occupants assume "the risk that one of their number might permit the common area to be searched."[94]

In 1990, the Court extended *Matlock*'s first prong in *Illinois v. Rodriguez*.[95] Gail Fischer told police that Edward Rodriguez assaulted her earlier that day in an apartment that she referred to as "our" apartment.[96] Fischer told the officers that Rodriguez was asleep in the apartment and consented to unlock the door to have Rodriguez arrested.[97] The officers entered without a warrant and saw drug paraphernalia and cocaine.[98] Police found Rodriguez asleep in the bedroom with more cocaine, and the State charged him with possession with intent to deliver.[99] At trial, Rodriguez moved to suppress the evidence, claiming that Fischer lacked the authority to consent to the entry because she moved out of the apartment weeks earlier.[100] The trial court agreed, finding that Fischer was merely an "infrequent visitor," and rejected the State's argument that as long as police reasonably believed Fischer had authority to consent, the police did not violate the Fourth Amendment.[101] The U.S. Supreme Court reversed the trial court, holding that a third party's *apparent* authority, as judged by the police, could make a search reasonable despite the fact that the third party lacked *actual* authority.[102]

Despite this expansion, the approach had a problem: if police requested

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89. *Matlock*, 415 U.S. at 171.

90. *Id.* at 172 n.7.

91. *Id.*

92. *Id.*

93. *Id.*; *see* Bow, *supra* note 80, at 1108 (noting that privacy expectations allow courts to "dilute or devalue" a non-consenter's "rights in order to add substance to the consenting party's independent right" to consent to a search).

94. *Matlock*, 415 U.S. at 172 n.7; *see* Virginia Lee Cook, *Third-Party Consent Searches: An Alternative Analysis*, 41 U. CHI. L. REV. 121, 131-32 (1973) (noting that assumption of risk is inadequate because co-occupants generally are "unaware that they can refuse"). *But see* Abrams, *supra* note 83, at 983 (noting that "assumption of risk" could mean that non-consenters do not have privacy).

95. 497 U.S. 177, 179, 186 (1990).

96. *Id.* at 179.

97. *Id.*

98. *Id.* at 180.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 186.

consent to search and one co-occupant refused while another consented, applying the *Matlock* rationale no longer seemed so reasonable. Logically, *Matlock* dictated that the non-consenter assumed the risk that co-occupants could consent. Thus the warrantless search would be reasonable under *Matlock*'s rationale. But this is not what the Supreme Court concluded in 2006 in *Georgia v. Randolph*.[103]

II. *GEORGIA V. RANDOLPH*: THIRD-PARTY CONSENT DOCTRINE SHIFTS COURSE

Before 2006, the Supreme Court's third-party consent doctrine appeared to reinstate the hated general warrant.[104] Police merely had to find someone who *appeared to them* to have common authority over an area and convince them to agree to a search without informing them of their right to refuse, and courts would deem the search reasonable.[105] Although the Court had not definitively declared whether a present co-occupant could prevent such searches, the issue seemed all but decided for finding such warrantless searches reasonable.[106] But in 2006, the Supreme Court decided otherwise in its hotly contested five-to-three *Georgia v. Randolph* decision.[107] Not only did the Court find a search in the face of an express refusal of consent unreasonable, the Court also adjusted its approach to third-party consent searches,[108] suggesting that the time was ripe for a complete overhaul of the tattered doctrine.

A. Georgia v. Randolph*: The Road to "Widely Shared Social Expectations"*[109]

Scott Randolph separated from his wife, Janet, when she moved to Canada with their son in May 2001, but about three months later, she returned to their Georgia home.[110] Janet called the police early one morning to report that Scott took their son.[111] When the officers arrived, Janet told them about their marital troubles, her trip to Canada, and that Scott's cocaine habit caused them financial problems.[112] Not much later, Scott returned, told the police officers that he took their son to a neighbor's house because he worried that Janet would take him to Canada again, that he did not use cocaine, and that it was his wife who was the drug abuser.[113]

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103. 547 U.S. 103, 120 (2006); *see supra* text accompanying note 11.

104. Kloster, *supra* note 39, at 123.

105. *See Rodriguez*, 497 U.S. at 185-86.

106. *See* Posting of Orin Kerr to the Volokh Conspiracy, http://www.volokh.com/posts/1131323472.shtml (Nov. 6, 2005, 18:31) (predicting that the Supreme Court would not likely limit or overrule the broad *Matlock* interpretation).

107. *Randolph*, 547 U.S. at 105 (Alito, J., did not participate).

108. *Id.* at 136-37 (Roberts, C.J., dissenting).

109. *Id.* at 111 (majority opinion).

110. *Id.* at 106. It not clear whether she returned to reunite with Scott or get property. *Id.*

111. *Id.* at 107.

112. *Id.*

113. *Id.*

After an officer retrieved their son, Janet claimed that there was evidence of Scott's drug habit in the home, but when the officer asked Scott to consent to a search, he "unequivocally refused."[114] The officer turned to Janet who "readily" consented and took the officer to the upstairs bedroom where the officer found a powdery residue that he suspected was cocaine.[115] Scott, Janet, and the officer went to the police station, where the State indicted Scott for cocaine possession after a subsequent search of the home, authorized by a warrant, turned up copious amounts of drug-related items.[116] The trial court denied Scott's motion to suppress the evidence as a product of an invalid warrantless search due to his refusal to consent, ruling that Janet had the necessary authority to consent to the initial search.[117]

The Georgia Court of Appeals reversed, holding that "'if the Fourth Amendment means anything, it means that the police may not undertake a warrantless search of defendant's property after he has expressly denied' his consent."[118] The court further held that the Fourth Amendment protected "the right to be free from police intrusion, not the right to invite police into one's home," and that it would be "disingenuous to conclude" that Scott waived his rights.[119]

The Georgia Supreme Court affirmed the Court of Appeals's reversal in a brief opinion that distinguished *Rodriguez* and *Matlock* on the basis that the police faced *physically present* co-occupants.[120] The court held that when a co-occupant was present and capable of objecting, the police were required to obtain the co-occupant's consent because holding otherwise exalted expediency over Fourth Amendment liberties.[121]

B. The U.S. Supreme Court's Ruling

When the U.S. Supreme Court granted certiorari in *Georgia v. Randolph*, some scholars predicted that the Court would reverse the Georgia Supreme Court, because the Court had long held "that anyone with common authority over a space can consent to a police search."[122] Instead, the U.S. Supreme Court adopted the Georgia Court of Appeals's bright-line rule:[123] if both parties are present, a

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114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 107-08.

118. Randolph v. State, 590 S.E.2d 834, 838 (Ga. Ct. App. 2003) (quoting Lawton v. State, 320 So. 2d 463, 465 (Fla. Dist. Ct. App. 1975)).

119. *Id.*

120. State v. Randolph, 604 S.E.2d 835, 836-37 (Ga. 2004).

121. *Id.* at 837 (concurring with and quoting State v. Leach, 782 P.2d 1035, 1040 (Wash. 1989)).

122. Kerr, *supra* note 106 (citing United States v. Matlock, 415 U.S. 164 (1974)).

123. *See* Georgia v. Randolph, 547 U.S. 103, 122-23 (2006); Jason M. Ferguson, Randolph v. Georgia*: The Beginning of a New Era in Third-Party Consent Cases*, 31 NOVA L. REV. 605, 622

co-occupant's consent cannot take precedence over another co-occupant's refusal.[124] The Court used a "widely shared social expectations" framework[125] in deciding that Fourth Amendment reasonableness dictates that "a physically present co-occupant's stated refusal to permit entry prevails" over another co-occupant's consent.[126]

Justice Souter's majority opinion in *Randolph* distinguished *Matlock* and *Rodriguez* on the basis that Randolph was physically present when he refused to consent.[127] Under his "widely shared social expectations" framework, Souter deemed that visitors to a shared residence "would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, 'stay out.'"[128] Justice Souter admitted that if *Matlock* and *Rodriguez* were not "undercut by" *Randolph*'s holding, the Court was "drawing a fine line" because requiring police to locate suspects in order to obtain their consent "would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field."[129]

Yet in oral arguments, Justice Souter said that *Matlock* and *Rodriguez* would "become almost silly cases" if the Court accepted Randolph's "argument that the presence of the person there expressing an objection is what makes the difference" because *Matlock* and *Rodriguez* "rest upon an assumption that is clearly contrary to fact."[130] That false assumption was that the defendants in *Matlock* and *Rodriguez* supposedly gave up their Fourth Amendment right by failing to be present when the police requested the co-occupant to consent because Matlock was in a nearby police car, and Rodriguez was sleeping in the home.[131] It remains to be seen whether other justices agree with Justice Souter's assertion that *Matlock* and *Rodriguez* would become "silly cases" if an express objection by a present co-occupant make searches conducted with the consent of another co-occupant per se unreasonable.

Despite the Court's efforts to preserve *Matlock* and *Rodriguez*, *Randolph* places a crippling limitation on the concept that "authority to consent over a common area constitutes an actual individual right."[132] In addition, *Randolph*

(2007).

124. *Randolph*, 547 U.S. at 120; *see* Jason E. Zakai, Note, *You Say Yes, But Can I Say No?: The Future of Third-Party Consent Searches After* Georgia v. Randolph, 73 BROOK. L. REV. 421, 444-47 (noting that courts interpret "express refusal" strictly and "physically present" narrowly).

125. *Randolph*, 547 U.S. at 111.

126. *Id.* at 106.

127. *Id.* at 120-21.

128. *Id.* at 113.

129. *Id.* at 121-22.

130. Transcript of Oral Argument at 46-47, *Randolph*, 547 U.S. 103 (No. 04-1067).

131. *See* Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27, 69-70 (2008).

132. Shane E. Eden, Student Article, *Picking the* Matlock*:* Georgia v. Randolph *and the U.S. Supreme Court's Re-Examination of Third-Party-Consent Authority in Light of Social Expectations*, 52 S.D. L. REV. 171, 177 (2007).

appears "to alter, if not in part overrule" *Rodriguez* by failing to discuss "the reasonableness of the officer's conduct."[133] *Matlock*'s first prong seemed to give co-occupants unlimited authority to consent to searches, but Justice Souter's opinion limits that right in concluding that the right is "not an enduring and enforceable ownership right" limited "by customary social usage."[134] The fact that Justice Souter hardly addressed the *Matlock*'s second prong to determine whether Randolph assumed the risk that his co-occupant would consent to a warrantless search suggests that prong is possibly a dead letter.[135] Chief Justice Roberts recognized as much in arguing in dissent that the Court "should acknowledge that a decision to share . . . necessarily entails the risk that those with whom we share may in turn choose to share . . . with the police."[136] The decision, although sensible, only narrowly protects the Fourth Amendment liberties of individuals who share, leaving ample ways for police to circumvent the substantive protections the decision attempted to implement.[137]

III. THE CIRCUIT SPLIT ON *RANDOLPH*'S RULE

Scholars predicted the confusion surrounding lower courts' interpretations of *Randolph*.[138] The most perplexing involve facts similar to Kevin Henderson's: police remove a non-consenting co-occupant, obtain another co-occupant's consent, and gather evidence against the removed, non-consenting party.[139] Removing the non-consenting party thwarts *Randolph* and places the resulting

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133. Ferguson, *supra* note 123, at 638. Abrams, *supra* note 83, at 977, notes that *Matlock* does not allow presence and objection to bar searches because that would mean that rights end when people leave, "an anomaly" the Court would not create. Yet, *Randolph* created that anomaly. *See Randolph*, 547 U.S. at 120-21; *see also*, Scott P. Johnson, *The Judicial Behavior of Justice Souter in Criminal Cases and the Denial of a Conservative Counterrevolution*, 7 PIERCE L. REV. 1, 14 (2008) (noting that "*Randolph* appeared to contradict precedent").

134. *Randolph*, 547 U.S. at 120-21.

135. *See id.* at 128 (Roberts, C.J., dissenting).

136. *Id.* at 142.

137. *See* Godfrey & Levine, *supra* note 12, at 731.

138. *See* George M. Dery, III & Michael J. Hernandez, *Blissful Ignorance? The Supreme Court's Signal to Police in* Georgia v. Randolph *to Avoid Seeking Consent to Search from All Occupants of a Home*, 40 CONN. L. REV. 53, 83 (2007) (concluding that *Randolph* "offered arguments that caused more questions than answers"); Madeline E. McNeeley, Case Note, *Validity of Consent to Warrantless Search of Residence when Co-Occupant Expressly Objects*, 74 TENN. L. REV. 259, 274 (2007) (concluding that *Randolph* abandoned "sound legal theory and reasoning in favor of conjecture and assumptions").

139. United States v. Henderson, 536 F.3d 776, 777-78 (7th Cir. 2008); *see* United States v. Ryerson, 545 F.3d 483, 489 (7th Cir. 2008) (holding that defendant's absence due to an arrest did not place the case under *Randolph* because the police did not arrest him to avoid objections); United States v. Chisholm, CR 07-795 (NGG)(MDG), 2008 U.S. Dist. LEXIS 106474, at *59 (E.D.N.Y. Oct. 29, 2008) (holding that the search of Chisholm's bedroom dressers, after his arrest, was valid because the consenter had authority to consent to search those areas).

search under *Matlock*.[140] This tactic's reasonableness has yet to be determined.[141] At least five justices believe that broadening of the third-party consent doctrine hit a speed bump and perhaps a roadblock.[142] The following three cases present an opportunity to explain how far Fourth Amendment protections extend in contested-consent searches.[143]

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140. Dery & Hernandez, *supra* note 138, at 55 (noting that *Randolph* "sends a signal to police to move people as if they were pieces on a chessboard" by making routine the moving of "persons away from seeing or hearing what occurs at the front door of the home").

141. *Compare Henderson*, 536 F.3d at 785 (limiting *Randolph* to situations where the non-consenting co-occupant is present), *with* United States v. Murphy, 516 F.3d 1117, 1124-25 (9th Cir. 2008) (holding that searches are invalid when a co-occupant objects regardless of location).

142. *See* McAllister, *supra* note 1, at 704; *see also* Zakai, *supra* note 124, at 464-65 (noting that third-party consent search doctrine changed as a result of *Randolph*).

143. The five justices who form *Randolph*'s majority, written by Justice Souter, include the three conventionally liberal justices: Stevens, Ginsburg, and Breyer. Georgia v. Randolph, 547 U.S. 103, 105 (2006); *see* JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 327 (2007) (noting that justices Stevens, Souter, Ginsburg, and Breyer are the Court's four liberals "by contemporary standards"). The Court's swing member, Justice Kennedy, *see id.*, joined silently, *Randolph*, 547 U.S. at 105, but it was Justice Breyer's concurrence that drew attention as *Randolph*'s swing vote. *See* Ferguson, *supra* note 123, at 641 (noting that Chief Justice Roberts's dissent suggests "Justice Breyer may have been initially inclined to support" the dissenters because "Roberts states that Justice Breyer, 'joins what becomes the majority opinion'" (quoting *Randolph*, 547 U.S. at 142 (Roberts, C.J., dissenting))).

With the election of Democrat Barack Obama, the Court is poised to shift, but not necessarily in favoring an expansive role for the Court's *Randolph* decision. *See* Adam Liptak, *To Nudge, Shift or Shove the Supreme Court Left*, N.Y. TIMES, Feb. 1, 2009, at WK1 (suggesting that the next justices that are likely to retire after Souter are Stevens and Ginsburg). The author of the *Randolph* opinion retired and was replaced. *See* Michael A. Fletcher & Paul Kane, *Successor to Souter Anticipated by October*, WASH. POST, May 2, 2009, at A01. The two other liberal justices most comfortable with the *Randolph* decision (Justice Stevens's concurrence focused on criticizing Justice Scalia's "originalist" theory of constitutional interpretation, *see Randolph*, 547 U.S. at 123-24 (Stevens, J., concurring)) are predicted to be the next retirees. These predictions make an expansive vision of *Randolph* seem bleak. *See* Godfrey & Levine, *supra* note 12, at 750 (noting that the Court may decide "to emphasize the case-specific nature"). In addition, liberal journalists have cited Justice Sotomayor as having "a troubling record on criminal justice" issues. *See* James Ridgeway, *The Progressive Case Against Sotomayor*, MOTHER JONES (July 16, 2009), *available at* http://www.motherjones.com/politics/2009/07/progressive-case-against-sotomayor.

Yet Chief Justice Roberts indicated that he believed it was time to re-think Fourth Amendment jurisprudence, *Randolph*, 547 U.S. at 137, and Justice Alito, who was "something of a mystery when . . . nominated," Elliott M. Davis, Note, *The Newer Textualism: Justice Alito's Statutory Interpretation*, 30 HARV. J.L. & PUB. POL'Y 983, 983 (2007), did not participate. *Randolph*, 547 U.S. at 123. A clue to the future of *Randolph* might be found in Justice Alito's 1985 application for a Justice Department promotion, where he wrote that his motivation for attending law school was partially based on his disapproval of the Warren Court. *See Oyez.org*, Samuel A. Alito, Jr., http://www.oyez.org/justices/samuel_a_alito_jr/ (last visited Mar. 1, 2009). During his

A. Randolph *Broadly Interpreted*

In *United States v. Murphy*,[144] police confirmed their suspicion that Stephen Murphy manufactured methamphetamine after detectives observed two individuals purchasing related ingredients and followed them to a storage unit used by Murphy.[145] After the individuals left the storage unit, a narcotics detective observed Murphy closing the unit's roll-up door.[146] When the detective knocked on the door, Murphy pulled the door up, and the detective saw a meth lab.[147] The detective arrested Murphy, read him his *Miranda* rights, conducted a protective sweep of the unit, and, after Murphy refused to consent to a full search of the unit, hauled him to jail.[148] A couple of hours later, narcotics detectives contacted the unit's renter, Dennis Roper, who told the detectives that he did not know about the lab, but permitted Murphy to stay there.[149] After the detectives arrested Roper on outstanding warrants, he signed a consent form for the officers to search the units where the detectives found and seized the lab.[150]

At trial, Murphy contested the validity of Roper's consent on the basis that it could not overrule his refusal to consent.[151] The prediction that officers would adapt to *Randolph* by merely removing the non-consenter proved correct initially.[152] The district court denied Murphy's motion based on *Matlock*'s two prongs: warrantless searches consented to by a co-occupant are reasonable, despite another co-occupant's refusal, because (1) a co-occupant has a right to permit a search and (2) the other co-occupant assumes the risk that the other

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confirmation hearings, Justice Alito maintained that those statements were merely an attempt to get a political job in a conservative administration. *Id.*

If the Court declines to extend the *Randolph* rule, the state high courts are more than capable of establishing an approach to contested third-party consent situations that protects its citizens from intrusive government searches. *See* discussion *infra* Part IV.D.

144. United States v. Murphy, No. CR 04-30057-AA, 2005 WL 2416828 (D. Or. Sept. 30, 2005), *aff'd in part, rev'd in part*, 516 F.3d 1117 (9th Cir. 2008).

145. *Id.* at *1.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at *1-2.

151. *Id.* at *2.

152. *See id.* at *4. *See also* United States v. Penney, No. 05-6821, 2009 U.S. App. LEXIS 17595, at * 26-27 (6th Cir. Aug. 7, 2009); United States v. Weston, No. 08-5094, 2009 CAAF LEXIS 642, at *9-10 (C.A.A.F. June 11, 2009); United States v. Travis, 311 F. App'x 305, 309-10 (11th Cir. 2009); United States v. Williams, 574 F. Supp. 2d 530, 545 (W.D. Pa. 2008) (holding that an objection to a search nullified a co-occupant's consent and that "a contrary reading . . . would allow police . . . to enter a residence to arrest [objecting] co-tenant[s]" on a co-occupant's consent); Eden, *supra* note 132, at 208 (noting that the *Randolph* created incentives for police to change procedures "to elude a defendant's fluctuating constitutional protection").

could consent.[153]

The Ninth Circuit Court of Appeals reversed on the basis that *Randolph* prohibits a co-occupant's consent from trumping another co-occupant's refusal.[154] The panel rejected the argument that *Randolph* was distinguishable because the objecting co-occupant was not present when the other co-occupant consented because there was no reason to allow Murphy's arrest to "vitiate" his objection.[155] The court found support in *Randolph* that a third party's consent is valid only if police do not remove the non-consenting co-occupant for the purpose "'of avoiding a possible objection.'"[156] The panel declared that *Randolph* established:

> that when one co-tenant objects and the other consents, a valid search may occur only with respect to the consenting tenant. It is true that the consent of either co-tenant may be sufficient in the absence of an objection by the other, either because he simply fails to object or because he is not present to do so. Nevertheless, when an objection has been made by either tenant prior to the officers' entry, the search is not valid as to him . . . .[157]

In *Martin v. United States*,[158] the District of Columbia Court of Appeals followed *Murphy*,[159] but this seems to be an exception with most courts narrowly interpreting *Randolph*.[160]

B. Randolph *Narrowly Interpreted*

In *United States v. Hudspeth*,[161] Missouri state police encountered Roy Hudspeth at his office while searching (with a warrant) for evidence relating to cold medicine sales.[162] After reading Hudspeth his *Miranda* rights, the officers showed him CDs of child pornography they found on his desk.[163] Hudspeth consented to a search of his office computer but refused to consent to a search of his home computer.[164] After jailing Hudspeth, the officers convinced his wife to

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153. *Murphy*, 2005 WL 2416828, at *4.

154. United States v. Murphy, 516 F.3d 1117, 1124 (9th Cir. 2008).

155. *Id.*

156. *Id.* (quoting Georgia v. Randolph, 547 U.S. 103, 121 (2006)).

157. *Id.* at 1125.

158. 952 A.2d 181 (D.C. Cir. 2008).

159. *Id.* at 187 (holding that after initial refusals, police could only obtain valid consent from the suspect (citing *Murphy*, 516 F.3d at 1125)).

160. McAllister, *supra* note 1, at 704-05 (noting the development of "multiple means of rejecting an otherwise legitimate *Randolph* claim").

161. United States v. Hudspeth, 459 F.3d 922 (8th Cir. 2006), *vacated on reh'g en banc*, No. 05-3316, 2007 U.S. App. LEXIS 16854 (8th Cir. Jan. 4, 2007), *reinstated in part en banc*, 518 F.3d 954 (8th Cir. 2008).

162. *Id.* at 924.

163. *Id.* at 924-25.

164. *Id.* at 925.

consent to the computer's seizure without telling her that he had refused.[165] The computer contained child pornography, including images of Hudspeth's stepdaughter.[166]

Hudspeth, charged with child pornography possession, attempted to suppress the evidence found on his home computer based on his express refusal to consent.[167] Hudspeth argued that his wife's consent could not "overrule" his denial of consent.[168] The district court denied Hudspeth's motion,[169] but an Eighth Circuit Court of Appeals panel reversed on the basis that *Randolph* made clear that police must obtain a warrant if a co-occupant refuses consent.[170]

The Eighth Circuit, sitting en banc, reversed with respect to the warrantless search by focusing on the fact that the case did not present the "'social custom' dilemma" that *Randolph* confronted because Hudspeth was not present when his wife consented.[171] Judge Riley noted for the majority that the reasons behind *Randolph*'s "narrow" holding did not apply because of the absence of Hudspeth's "physical presence *and* immediate objection."[172] Judge Melloy, author of the panel decision, dissented from the en banc decision on the basis that another person could not overrule Hudspeth's refusal to consent.[173]

C. Kevin Henderson and the Meaning of "Get the Fuck Out of My House"[174]

The final case involves Kevin Henderson and his wife's consent to search.[175] After prosecutors charged Henderson, he filed a motion to suppress on the basis that *Randolph* made warrantless searches of homes, over an "'express refusal . . . by a physically present resident,'" unreasonable, regardless of another's consent.[176] The district court found the reasoning of the Eighth Circuit's *Hudspeth* panel decision persuasive, holding that Henderson's "rather indelicate instruction for [the police] to leave his home surely included . . . that they . . .

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165. *Id.*

166. *Id.* at 926.

167. *Id.*

168. *Id.* at 928.

169. *Id.* at 926.

170. *Id.* at 931.

171. United States v. Hudspeth, 518 F.3d 954, 960 (8th Cir. 2008) (en banc).

172. *Id.* (emphasis in original). Judge Riley dissented in the panel decision. *Hudspeth*, 459 F.3d at 932 (Riley, J., dissenting).

173. *Hudspeth*, 518 F.3d at 962 (Melloy, J., dissenting). *See also* Benjamin M. Johnston, Note, *Cotenants Trumping Cotenants: The Eighth Circuit Takes a Diverse Stance on Cotenants' Authority Under the Fourth Amendment*, 73 MO. L. REV. 1327, 1346 (2008) (noting that *Hudspeth* was based on the suspect's "physical location at the time of denial").

174. United States v. Henderson, No. 04 CR 697, 2006 U.S. Dist. LEXIS 88404, at *2 (N.D. Ill. Nov. 29, 2006).

175. *See* discussion *supra* in INTRO.

176. *Henderson*, 2006 U.S. Dist. LEXIS 88404, at *4 (quoting Georgia v. Randolph, 547 U.S. 103, 120 (2006)).

refrain from searching the residence."[177]

The Seventh Circuit Court of Appeals reversed, holding that "*Randolph* left the bulk of third-party consent law in place; its holding applies only when the defendant is both present and objects to the search."[178] Henderson's objection "lost its force" when the police arrested him, and his wife "was free to consent to a search notwithstanding [his] prior objection."[179] The court noted that *Randolph* left unanswered whether "a refusal of consent by a 'present and objecting' resident" bars "the voluntary consent of another resident with authority after the objector is arrested and is therefore no longer 'present and objecting.'"[180] The court noted the circuit split, found the cases "materially indistinguishable," and sided with the Eighth Circuit's en banc holding that a conflict between *present* co-occupants played a key function in *Randolph*'s "social expectations" framework.[181] Drawing on an erroneous baseball saying that a tie goes to the runner,[182] the court noted that "between two present but disagreeing residents with authority, the tie goes to the objector," but "[t]he calculus shifts . . . when the tenant seeking to deny entry is no longer present."[183] The court held that *Randolph* did not give an objector "an absolute veto" and argued that *Murphy* erroneously eliminated the requirement that the objector be present.[184]

IV. A NEW APPROACH TO THIRD-PARTY CONSENT

Co-occupants' Fourth Amendment rights to be free from warrantless searches may now depend, outside the Ninth Circuit and the District of Columbia, on whether the police are able to remove the objector to obtain consent from obliging co-occupants. As demonstrated in the circuit split, *Randolph*'s bright-line rule allows police a straightforward means of getting around the decision's attempt to protect non-consenting co-occupants' liberties.[185] On the other hand, the Ninth Circuit's broad interpretation creates a predictable guideline for police: once a co-occupant objects, another co-occupant cannot override that person's objection regardless of their presence.[186] Courts must recognize the need for a new approach to third-party consent searches, and in doing so, institute sensible,

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177. *Id.* at *7.

178. United States v. Henderson, 536 F.3d 776, 777 (7th Cir. 2008).

179. *Id.*

180. *Id.* at 781.

181. *Id.* at 783.

182. *See* Tim McClelland, Ask the Umpire, http://mlb.mlb.com/mlb/official_info/umpires/feature.jsp?feature=mcclellandqa (last visited Mar. 1, 2009) (noting that there is no "tie goes to the runner" rule, however, "the runner must beat the ball to first base, and so if he doesn't beat the ball," he is called out).

183. *Henderson*, 536 F.3d at 783-84.

184. *Id.* at 784.

185. *See* discussion *supra* Part III.B-C.

186. United States v. Murphy, 516 F.3d 1117, 1124-25 (9th Cir. 2008); *see* discussion *supra* Part III.A.

substantive safeguards to protect Fourth Amendment liberties.

A. Adopting a New Approach for Searches Conducted Under Third Party Consent

Randolph seemed to halt the broadening of third-party consent doctrine.[187] Some scholars noted that it was unclear whether courts would use the case "as a tool for strengthening Fourth Amendment privacy protections," and that the holding's narrowness "may compromise the decision's precedential value."[188] Analysis ranges from disparagement, to praise, to confusion.[189] Scholars have classified the Court's decision as: flawed and inherently weak;[190] unnecessarily and imprudently formalistic;[191] insufficient in protecting Fourth Amendment rights;[192] an "abandon[ment] of sound legal theory and reasoning" in favor of "an exceedingly narrow holding of little practical value;"[193] "a signal to police to move people as if they were pieces on a chessboard;"[194] a strengthening of the Fourth Amendment's protection against unreasonable searches;[195] the launch of "a new era;"[196] and the indication of "an important change."[197] The Court's "widely shared social expectations" test and decision have received anything but consensus or consistent application from the courts,[198] indicating the need for a

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187. *See* Fiske, *supra* note 12, at 738 (noting that the *Randolph* decision "comes as an unexpected departure from" the "trend of expanding" consent searches); *see also* Godfrey & Levine, *supra* note 12, at 744 (noting that *Randolph*'s "impact may be lessened because of the specificity of its holding and by the inconsistencies in [its] analytical framework"). *But see* Note, *supra* note 20, at 1726 n. 128 (arguing that *Randolph* "[did] little to impinge on police discretion, as there is no craft in determining whether someone is standing in a doorway").

188. Godfrey & Levine, *supra* note 12, at 731.

189. *See* Black, *supra* note 10, at 334 (noting that although *Randolph* provided a "much needed refinement," the holding "[left] a door open wide enough to drive a squad car through").

190. Alissa C. Wetzel, Comment, Georgia v. Randolph*: A Jealously Guarded Exception—Consent and the Fourth Amendment*, 41 VAL. U. L. REV. 499, 501, 514 (2006).

191. Eden, *supra* note 132, at 171.

192. Adrienne Wineholt, Note, Georgia v. Randolph*: Checking Potential Defendants' Fourth Amendment Rights at the Door*, 66 MD. L. REV. 475, 475 (2007).

193. McNeeley, *supra* note 138, at 274.

194. Dery & Hernandez, *supra* note 138, at 55.

195. Nathan S. Lew, Note, *Nothing to Be Worried About: Consent Searches After* Georgia v. Randolph, 28 WHITTIER L. REV. 1067, 1067 (2007).

196. Ferguson, *supra* note 123, at 605.

197. Maclin, *supra* note 131, at 35.

198. *Compare* United States v. Lopez, 547 F.3d 397, 400 (2d Cir. 2008) (holding that consent by the defendant's girlfriend was reasonable because he failed to object once officers arrested him, and that the officers did not have to seek his consent), *with* United States v. Glover, 583 F. Supp. 2d 5, 18-19 (D.D.C. 2008) (holding that had the defendant objected after arrest, the search would have been unlawful, but the court believed the police that he had not objected), and United States v. Tatman, 615 F. Supp. 2d 664, 678 (S.D. Ohio 2008) (defendant's objection trumped the consent

more robust or at least more particularized approach for third-party consent searches.

Chief Justice Roberts suggested in *Randolph* that the majority's "arbitrary lines" signaled the need to rethink Fourth Amendment jurisprudence.[199] *Randolph* appropriately moved away from the assumption of risk framework, which crippled Fourth Amendment liberty by presuming that co-occupants assume the risk that their shared space may be subject to warrantless searches without their consent.[200] This shift has provided some with "guarded optimism" that the Court is now considering citizens' "actual expectations" when officers request consent.[201]

Yet additional changes are needed. The Court should depart from *Randolph*'s unclear "widely shared social expectations" approach because it provides poor guidance for determining a search's validity and fails to substantively protect Fourth Amendment liberties.[202] The Court also ought to replace assumption of risk with a framework that meaningfully upholds the Fourth Amendment's promise to protect individuals' liberties. The circuit split provides a prime opportunity for the Court to jettison the current doctrinal morass in favor of one that gives meaning to Fourth Amendment liberties and provides clear rules for third-party consent searches.

B. Personal Consent: A Reasonable Approach to Third-Party Consent

Some scholars have called for the complete abolition of consent searches.[203] Others argue for eliminating third-party consent searches.[204] A middle-ground option proposed in 1976 in response to the (accurately) anticipated problems resulting from the Court's *Matlock* decision deserves a re-examination in the wake of the *Randolph* decision.[205]

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of an individual with apparent authority).

199. Georgia v. Randolph, 547 U.S. 103, 137 (2006) (Roberts, C.J., dissenting).

200. *See* Weinreb, *supra* note 57, at 49 (nothing that an "absence of continuously developing rationalization" has resulted in an "unstable and unconvincing" doctrine).

201. John M. Burkoff, *Search Me?*, 39 TEX. TECH L. REV. 1109, 1131-32 (2007) (discussing how *Randolph* provides "a ray of hope" that the Supreme Court is beginning "to truly reflect the actual voluntariness—or involuntariness—of the questioned consents"). *See also* Matthew W.J. Webb, Note, *Third-Party Consent Searches After* Randolph*: The Circuit Split Over Police Removal of an Objecting Tenant*, 77 FORDHAM L. REV. 3371, 3414 (2009) (applying the "test of generalizability" proposed in Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 104 (2008), to decide third-party consent searches).

202. Wineholt, *supra* note 192, at 496 (arguing *Randolph* "provides only arbitrary protection" of constitutional rights).

203. Strauss, *supra* note 55, at 258. *But see* Bow, *supra* note 80, at 1113 (noting courts would not likely create a "straightjacket" rule).

204. Comment, *supra* note 75, at 812.

205. Gary K. Matthews, *Third-Party Consent Searches: Some Necessary Safeguards*, 10 VAL. U. L. REV. 29, 37 (1975). *But see* Abrams, *supra* note 83, at 977-79 (arguing against the approach

Existing third-party consent doctrine combines assumption of risk analysis with the co-occupants' right to consent in their own right.[206] But the doctrine fails to explain why one co-occupant's consent should suspend another's rights.[207] The approach re-examined and re-proposed in this Note—referred to here as the "personal consent" approach—attempts to restore meaning to the Supreme Court's early language that the Fourth Amendment's core protection was a "personal right to be free from arbitrary police intrusions into one's privacy."[208]

The personal consent approach is applicable in situations similar to *Randolph*. Police suspect an individual of crime. The level of suspicion is measured similar to the standard used in custodial police interrogations in which *Miranda* is required.[209] In other words, the approach activates when an "investigation is no longer a general inquiry . . . but has begun to focus on a particular suspect."[210] Once the personal consent approach triggers, a warrantless search is valid if: (1) police know the whereabouts of the particular person by means of a reasonable effort and (2) this particular person consents to the search.[211] Under the personal consent approach, all warrantless searches would be invalid when an individual, with authority over the area, refuses to consent, regardless of another co-occupant's consent.[212] As some courts have held,[213] this approach bars a third party's authority to consent when another co-occupant objects.

For example, in applying the approach in *Henderson*, Kevin's statement to police to "get the fuck out" would make any subsequent warrantless searches of his house unreasonable as applied to him.[214] Even if Kevin had failed to announce that he did not want to waive his constitutional rights—either because he failed to express his refusal or because the police did not bother to ask—the police would not be able to conduct a warrantless search unless Kevin consented.[215] The personal consent approach is consistent with the Court's

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proposed by Matthews because it depends upon officer's perceptions).

206. United States v. Matlock, 415 U.S. 164, 172 n.7 (1974).

207. Comment, *supra* note 75, at 807-08 (explaining that although "possession and control" serves a useful "negative function" of excluding individuals from consenting, it does not explain how the "consenter's power should be permitted to be exercised freely" at others' expense); *see* Recent Case, *Evidence Gained from Search to Which Wife Consented is Admissible Against Husband*, State v. Coolidge, *106 N.H. 185, 208 A.2d 322 (1965)*, 79 HARV. L. REV. 1513, 1516 (1966) (questioning soundness of the "possession and control rule").

208. Comment, *supra* note 75, at 808 (citations omitted).

209. Matthews, *supra* note 205, at 37.

210. *Id.* (quoting Escobedo v. Illinois, 378 U.S. 478, 490 (1964) (internal quotations omitted)); *see* Note, *supra* note 70, at 130.

211. Matthews, *supra* note 205, at 37-39.

212. *See id.* at 39-40.

213. *See, e.g.*, Lucero v. Donovan, 354 F.2d 16, 21 (9th Cir. 1965).

214. *See* United States v. Henderson, 536 F.3d 776, 786 (7th Cir. 2008) (Rovner, J., dissenting); discussion *supra* INTRO., Part III.C.

215. *See* discussion *infra* Part IV.C. The good faith exception, expanded in *Herring v. United States*, 129 S. Ct. 695, 703 (2009), could co-exist with this approach. *See generally* Adam Liptak,

declaration "that search and seizure procedures must be easy to administer,"[216] because it merely requires police to have their suspect's consent, but only if that particular suspect is available.

When police target a particular location, rather than a specific person, the personal consent approach would allow the police to conduct a warrantless search when the location's owner consents, so long as another owner does not object. For example, if the police investigate the smell of methamphetamine in a shed, the consent of an individual with authority over the shed validates the warrantless search as long as no one with authority over the shed objects. Some Fourth Amendment protections are sacrificed. But, searches conducted pursuant to the personal consent approach are considerably more reasonable than searches conducted when a suspect was available, but the police merely bypassed, removed, or ignored the protests (or potential protests) in favor of the consenting party who may not suffer any repercussions.

Because the personal consent approach is only applicable in cases in which the police know of the suspect's location, courts must decide when the personal consent approach applies on a case-specific basis.[217] Whether the suspect is in custody, asleep somewhere in his house, or standing at the door, the personal consent approach requires police to receive the suspect's consent to warrantlessly search for evidence implicating the suspect but only if they know his whereabouts.[218] If the police genuinely do not know his whereabouts, his absence nullifies his right to object.[219] Also, if police are present at different locations possessed by the suspect, a refusal to consent to a search at one location would be imputed to all other locations possessed by the suspect because the law enforcement officials know the suspect's location. Of course, police could request the suspect to consent to a warrantless search at other locations owned or possessed by the suspect. If the suspect consented to searches at those other locations, as unlikely as that may seem, the personal consent approach would not bar that search's results. Consent by a third party at a second location would not vitiate the suspect's refusal, regardless of whether the suspect expressly refused to consent to a search at that particular location.[220]

If police obtain a non-suspect's consent for a search but find evidence

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Justices Step Closer to Repeal of Evidence Ruling, N.Y. TIMES, Jan. 31, 2009, at A1 (discussing the moves towards the exclusionary rule's abolition by the U.S. Supreme Court).

216. Cook, *supra* note 94, at 133 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 231 (1973)).

217. Matthews, *supra* note 205, at 37-40; *see* Johnson, *supra* note 7, at 814 (advocating a "urgency standard" to determine when a third party's consent to a search made a warrantless intrusion reasonable for Fourth Amendment purposes).

218. *See* Bow, *supra* note 80, at 1113; Recent Case, *supra* note 207, at 1519 (arguing that such a rule is the "only satisfactory alternative" to barring third-party consents).

219. *See* Bow, *supra* note 80, at 1115 (noting that the reasonableness requirement would determine whether police made reasonable efforts to get "the consent of all parties").

220. See discussion *supra* Part III.B, where Hudspeth expressly told the police, although at his office, that they could not search his home. *See also* discussion *infra* Part IV.C.

implicating that individual, rather than evidence implicating the original suspect, that search would be reasonable, which is consistent with existing consent search doctrine.[221] The previously unsuspected individual voluntarily made the warrantless search reasonable by consenting.[222] Yet another situation that would allow a search under the personal consent approach is when an officer obtains the consent of a suspected individual, and the evidence discovered implicates a previously unsuspected individual.[223] This warrantless search would be reasonable because an officer took the initial step of receiving consent from their suspect.[224]

The personal consent approach requires courts to consider an officer's subjective motivations whether they suspect an individual and whether or not they genuinely know the suspect's location. Determining an officer's subjective motivation for requesting consent for a warrantless search is not always easy, but as Chief Justice Roberts noted in his *Randolph* dissent, the Court's decision encouraged lower courts to determine an officer's subjective motives in requesting consent.[225] Determining an officer's subjective mindset could be sorted out at a suppression hearing.[226] Two key questions that judges could ask would be whether the suspect provided consent to the warrantless search and, if not, why did the suspect not consent.[227]

The personal consent approach recognizes the police need to search in situations in which an individual suspected of a crime offers cooperation. Under this approach, police do not have to obtain the consent of all unsuspected individuals possessing authority over the area because, if the evidence implicates individuals other than the initial suspect, either their absence or failure to object strengthens the search's reasonableness. Police do not need to hunt down suspects because the consent of an individual with appropriate authority over the area would be sufficient to make the search reasonable if the suspect's location is genuinely unknown. During the search, if police encounter an individual with adequate authority over the area and that individual asks the police to end their warrantless search, absent probable cause for continuing the search or arresting the individual, the search must end.[228]

The Court's well-recognized exigent circumstances exceptions, which allow police to conduct warrantless searches regardless of any individual's consent, militate against the personal consent approach's requirement for officers to obtain the proper consent prior to warrantless searches. Therefore, the personal consent approach does not implicate the *Randolph* Court's concern that officers have the

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221. Matthews, *supra* note 205, at 39.

222. *Id.*

223. *Id.* at 40.

224. *Id.*

225. *See* Georgia v. Randolph, 547 U.S. 103, 138 (2006) (Roberts, C.J., dissenting).

226. Matthews, *supra* note 205, at 41.

227. *Id.*

228. *See supra* text accompanying note 131 (explaining that Rodriguez was sleeping when police entered); *see also* Illinois v. Rodriguez, 497 U.S. 177, 179 (1990).

ability to investigate domestic violence by obtaining the consent of victims.[229] The Court has made it unambiguously clear that certain warrantless searches are reasonable if the facts demonstrate "exigent circumstances."[230]

A predicable reaction to the personal consent approach is that it could allow suspects to break the law without consequence because the exclusionary rule could bar the evidence needed to convict. Yet obtaining a warrant remains a reasonable option,[231] and the inconvenience of a neutral magistrate determining whether the circumstances justify a search based on probable cause would not prevent police from gathering the same evidence they attempt to gather on the basis of a third party's consent. Officers could ask the cooperating co-occupants to deliver the evidence and sign an affidavit to allow the evidence's admission in court.[232] In addition, the cooperating co-occupant could inform the police of the illegal activities, and the police may use that information to obtain a warrant.[233]

The civil libertarian's demand for police officers to "just get a warrant," often rings on deaf ears because the case usually involves whether or not a potentially dangerous person should go free via the exclusionary rule.[234] Yet trial courts would invoke "just get a warrant" more often if Fourth Amendment jurisprudence prevented police officers from approving unreasonable third-party consent searches. Although legal scholars have criticized the exclusionary rule's broad applicability,[235] and the Court may be eroding its protections,[236] the exclusionary

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229. *Randolph*, 547 U.S. at 118-19. Exigent circumstances, which if present, may make reasonable a warrantless search, include, among others, searches incident to an arrest, hot pursuit, imminent danger, police safety, and evidence spoliation. *See* Black, *supra* note 10, at 323-24. See also Godfrey & Levine, *supra* note 12, at 747-48, for how *Randolph* muddied exigent circumstances doctrine.

230. 3 LAFAVE, *supra* note 34, § 6.5.

231. *See* William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 888 (1991) (noting that obtaining a warrant takes "a few minutes"). The two-plus hours between Murphy's arrest and Roper's consent provided ample time to obtain a warrant. *See* discussion *supra* Part III.A.

232. Note, *supra* note 70, at 150 (noting that an officer's burden would dissipate if the cooperating co-occupant secured the evidence, or the officer could simply obtain a warrant).

233. Bob Mosteller, Georgia v. Randolph*:* *The Supreme Court Limits the Fourth Amendment's Consent Doctrine*, SUP. CT. ONLINE, http://www.law.duke.edu/publiclaw/supremecourtonline/commentary/geovran.

234. *But see* United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) ("It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people. . . . [W]e must deal with [a shabby defrauder's] case in the context of [the Fourth Amendment's great themes.]"), *overruled by* Chimel v. California, 395 U.S. 752, 759 (1969).

235. *See* Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 49-53 (1981) (using economics to argue that tort should protect the Fourth Amendment because only criminals receive the benefit of an exclusion). *See generally* 1 LAFAVE, *supra* note 34, § 1.2 (describing the exclusionary rule as "under attack").

236. *See* Herring v. United States, 129 S. Ct. 695, 703 (2009) (holding that exclusionary rule

rule's core purpose—that no one should be convicted on unconstitutionally obtained evidence—remains unassailable because of its basic significance of Fourth Amendment liberties.[237]

Exceptions to the warrant requirement that transform warrantless searches into reasonable searches do not exist to provide police with the path of least resistance. Likewise, Fourth Amendment protections not only guard the rights of suspected criminals, but they also protect law-abiding individuals.[238] An inherently difficult statistic to track would be how often police conduct a warrantless third-party consent searches and find no wrongdoing.[239] The result of such fruitless searches is an intrusion upon an individual that fails in bringing criminal liability upon the consenter, but does successfully bring shame, stigma, and anger.[240] Failing to protect privacy keeps individuals from conducting their lives outside the "public view."[241] Lax standards for consent searches act as "an end-run around of the core meaning of the Fourth Amendment."[242] When consent becomes "too easy," particularly when used for house searches, the doctrine works against the Fourth Amendment's demand for reasonable government searches.[243]

In addition, the Fourth Amendment does not just protect privacy, and if courts wrestled with its additional protections, they would inevitably strengthen its foundations.[244] Professor Rubenfeld argues that the Fourth Amendment text "does not guarantee a right of privacy,"[245] but in attempting to do so, has become a "doctrinal black hole" leading to a "logical dead end."[246] The Fourth Amendment's role as a guard of "a right of security" must be revitalized to prohibit abuses.[247] Relying on privacy for determining a search's reasonableness "weaken[s] the amendment's ability to effectively constrain government," as

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did not apply for a police recordkeeping error); Liptak, *supra* note 215 (analyzing whether the Court's opinion in *Herring* indicated "that the exclusionary rule itself might be at risk").

237. *See* 1 LAFAVE, *supra* note 34, § 1.2.

238. Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1230 (1983) (arguing that the Court should focus on the innocent in developing its Fourth Amendment jurisprudence).

239. *But see* VERNIERO & ZOUBEK, *supra* note 54, at 28 (noting that most consent searches fail to find illegal activity).

240. *See* Strauss, *supra* note 55, at 271.

241. Weinreb, *supra* note 57, at 52-53 ("[Privacy] enables us to do things that we . . . are a bit embarrassed about doing: to meet a friend quietly, to act out love and hate, to do all the things that we should not do in the same way at high noon in Times Square.").

242. Thomas Y. Davies, *Denying a Right by Disregarding Doctrine: How* Illinois v. Rodriguez *Demeans Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error*, 59 TENN. L. REV. 1, 98 (1991).

243. *Id.*

244. *See* Comment *supra* note 75, at 798.

245. Rubenfeld, *supra* note 201, at 104.

246. *Id.* 103-05.

247. *Id.* at 105.

privacy tends to fail against police interests when analyzed under a constitutional magnifying glass.[248]

Under the personal consent approach, a refusal to consent would bar law enforcement from searching for evidence. But consent searches must be reasonable to fall out of the Fourth Amendment's warrant requirement. Until the Court announces a precise and predictable reasonableness definition,[249] a rule that balances Fourth Amendment prohibition of unreasonable, warrantless searches with law enforcement's need to investigate is preferable to an arbitrary rule that prohibits searches only when the suspect is present at the door of the house.[250]

C. Application of the Personal Consent Approach to the Circuit Split

The personal consent approach protects the liberty interests of individuals such as Kevin Henderson to be free from unreasonable warrantless searches because police would know a search warrant was necessary once he refused to consent.[251] This additional burden is not de minimis, but other rules protecting constitutional liberties do not prevent police from doing their jobs.[252] With the Court's view of Fourth Amendment liberties as a conflict flanked by privacy and the surrendering of some of those privacy rights by sharing property, an officer's need to investigate suspected criminal activity consistently tips the scales of justice in favor of finding a third party's consent as reasonable.[253] Yet *Randolph* rejected the equation that the suspect's assumption of risk, plus the third party's right to consent, plus a police need to investigate efficiently somehow equals an interest superior to the personal interests safeguarded by the Fourth Amendment.[254] As one scholar noted about *Randolph*, the Court knew that requiring warrantless consensual searches to "be genuinely consensual" meant that criminal evidence "might never come to the attention of the authorities."[255]

Judge Rovner stated at the beginning of her formidable dissenting opinion in *Henderson* that the "one and only one reason that this case is not on all fours with

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248. Castiglione, *supra* note 75, at 661.

249. *Id.* at 656 (noting that the Fourth Amendment's reasonableness standard "is just about the most unhelpful guidepost one could have concocted").

250. *See* Bow, *supra* note 80, at 1116-17.

251. *See* United States v. Henderson, 536 F.3d 776, 777-78 (7th Cir. 2008); Matthews, *supra* note 205, at 37-39.

252. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, PRISONERS IN 2007, at 6 (2008) http://www.ojp.gov/bjs/pub/pdf/p07.pdf (noting that U.S. prisons held 2.3 million prisoners at the end of 2007, which was 1.5% increase from the previous year. This rate of growth, however, was lower than the average annual growth rate from 2000-2006 of 2.6%).

253. *See* Comment, *supra* note 75, at 810; *see also* Castiglione, *supra* note 75, at 657.

254. *See* Georgia v. Randolph, 547 U.S. 103, 128 (2006) (Roberts, C.J., dissenting).

255. Burkoff, *supra* note 201, at 1135 (citing *Randolph*, 547 U.S. at 120) (highlighting that Justice Souter stated that searching private areas "in the face of disputed consent" requires "clear justification before the government searches private living quarters over a resident's objection").

Georgia v. Randolph: When Kevin Henderson told the police to 'get the fuck out' of his house, the officers arrested and removed *him* instead."[256] If Henderson had remained at home, the police could not have searched regardless of the consent of his wife until they had obtained a warrant.[257] The *Henderson* majority approach purges the protections *Randolph* attempted to implement because it gives police an opportunity to skirt around its rule. Although *Randolph* may merely mean that a present non-consenting co-occupant's refusal to consent wins, this interpretation permits police to either arrest individuals who refuse to consent or wait for them to leave, emptying the case's force. If the officers in *Randolph* had known this, they would have simply waited for him to leave and would have allowed his wife's consent to waive his rights.

Under personal consent, Hudspeth's express refusal to consent to a search of his home would make any subsequent warrantless search of the home unreasonable regardless of who consented.[258] Circuit Judge Melloy's dissent argued that the Supreme Court's jurisprudence supported the conclusion that an objection to a warrantless search makes law enforcement's reliance on a subsequent consent unreasonable.[259] In *Hudspeth*, the dissent pointed out that the majority focused on the defendant's location when he made his objection as the determining factor.[260] Allowing the Fourth Amendment's "expectation of privacy" to depend "upon a tape measure" would be ludicrous, Melloy argued.[261]

Murphy's holding, that *Randolph* means that "[o]nce a co-tenant has registered his objection, his refusal to grant consent remains effective" even though another co-occupant consents,[262] aligns with the personal consent approach. Once Murphy—the individual suspected by law enforcement—refused to consent, all warrantless searches would be invalid against him regardless of another's consent. The court's interpretation of *Randolph* to mean that police "cannot arrest a co-tenant and then seek to ignore [his] objection[s]" allows officers to search for evidence against the consenting co-occupant.[263] The court's holding also permits a co-occupant's consent to justify a warrantless search in the suspect's absence. Although the Ninth Circuit's reputation for projecting a liberal judicial philosophy is one explanation for its broad *Randolph* interpretation,[264]

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256. *Henderson*, 536 F.3d at 785-86 (Rovner, J., dissenting).

257. *Id.*

258. *See* United States v. Hudspeth, 518 F.3d 954, 955 (8th Cir. 2008) (en banc).

259. *Id.* at 961-62 (Melloy, J., dissenting).

260. *Id.* at 964.

261. *Id.*

262. United States v. Murphy, 516 F.3d 1117, 1125 (9th Cir. 2008).

263. *Id.* at 1124-25 (holding that "a valid search may occur only with respect to the consenting tenant").

264. *But see* Jerome Farris, *Judges on Judging: The Ninth Circuit-Most Maligned Circuit in the Country Fact or Fiction?*, 58 OHIO ST. L.J. 1465, 1470-71 (1997) (arguing that the circuit's reversal rate is due to its high case load and willingness to tackle "controversial issues"). The Ninth Circuit limited its *Murphy* holding in *United States v. Brown*, 563 F.3d 410, 417 (9th Cir. 2009), holding that there was no evidence that police arrested Brown to avoid his objections.

another is that the Ninth Circuit correctly interpreted the Supreme Court's signal in *Randolph* that the broadening police powers for warrantless searches and the diminishing of individuals' Fourth Amendment liberties had ended.

Another Seventh Circuit case in which the personal consent approach results in the exclusion of evidence discovered in a third-party consent search after the suspect declined to consent is *United States v. Reed*.[265] Police arrested Terry Reed because he was driving with a suspended driver's license, and during a search of his person, police discovered a baggie of crack cocaine.[266] The officers asked Reed to consent to a search of his home because they suspected he stored guns there.[267] Reed declined and stated that he could not give the officer "permission" because "it's not [his] place." But Reed's girlfriend told the officers that they leased the residence together and consented to a search, which turned up ammunition, cocaine, and documents addressed to Reed at that address in the home's bedroom.[268] The court held that a co-occupant's consent supersedes an objecting party's refusal when the objector is absent.[269]

Under personal consent, Reed in giving a false statement—"Naw, it's not my place. I can't give you permission for that"[270]—did not waive his Fourth Amendment protections to a search of what was in fact his home because Reed's girlfriend corrected Reed's falsehood.[271] Had Reed truthfully told the officers, "Aww, I'd rather you not search my place, but I'll give you permission for that," the police would not be required to get a warrant to search. But if the officers objectively knew or believed that Reed did not have authority to consent to a search, the personal consent approach would allow the warrantless search when an individual with authority over the area, such as his girlfriend, consented.

Adopting this approach forces the Supreme Court to confront the awkward fact that its third-party consent doctrine has significantly eroded Fourth Amendment liberties, particularly for individuals who share property. As Justice Jackson stated, zealous police officers often fail to grasp "[t]he point of the Fourth Amendment," which requires a "neutral and detached magistrate" to decide whether the circumstances justify the invasion of a person's home as opposed to an "officer engaged in the often competitive enterprise of ferreting out crime."[272]

D. State Adoption of the Personal Consent Approach

States are free to impose greater restrictions on police activity than required

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265. 539 F.3d 595, 597 (7th Cir. 2008).

266. *Id.*

267. *Id.*

268. *Id.* Fingerprint tests showed that Reed owned the guns. *Id.*

269. *Id.* at 598-99.

270. *Id.* at 597.

271. *Id.*

272. Johnson v. United States, 333 U.S. 10, 13-14, 16-17 (1948) (holding that a warrantless search violated the Fourth Amendment despite whether the officers' had probable cause).

under the Federal Constitution.[273] Fourth Amendment jurisprudence has been declared "an embarrassment," and the "vast jumble of judicial pronouncements" are "not merely complex and contradictory, but often perverse."[274] Justice Brennan has noted that the Court should not be "dispositive of questions regarding rights guaranteed by counterpart provisions of state law."[275] For example, although the U.S. Supreme Court continues to refuse to require officers to inform individuals of their right to refuse to consent,[276] some states have required officers to inform citizens that they have *state* constitutional rights to refuse.[277] Hawaii, Minnesota, New Jersey, and Rhode Island have outlawed consent-based warrantless searches, and California ended the practice as a condition of settling a lawsuit.[278] This state-based broadening of liberty is an encouraging sign that robust Fourth Amendment protections can serve both liberty and police needs through approaches that deviate from Supreme Court pronouncements.[279]

Indiana courts were "early and noteworthy" participants in interpreting "its bill of rights to defend personal liberty."[280] Although Indiana's constitutional search and seizure clause is nearly identical to the Fourth Amendment, the State must prove the reasonableness of an officer's activity in conducting a warrantless search as opposed to the federal constitutional expectation of privacy test.[281] The court has granted special status to automobiles in examining the totality of the circumstances surrounding police vehicle searches, noting that "Hoosiers regard their automobiles as private and cannot easily abide their uninvited intrusion."[282] For Indiana police to search trash left out for pick-up, an officer must have an "articulable individualized suspicion" that the search's subjects have broken the

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273. Oregon v. Hass, 420 U.S. 714, 728-29 (1975) (Marshall, J., dissenting) (noting that state high courts are particularly capable of deciding whether police should follow stricter rules).

274. Amar, *supra* note 15, at 757-58.

275. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

276. *See* United States v. Drayton, 536 U.S. 194, 206-07 (2002).

277. *See* State v. Ferrier, 960 P.2d 927, 933-34 (Wash. 1998) (holding that a waiver must be an "informed decision"); State v. Johnson, 346 A.2d 66, 68 (N.J. 1975) (holding that the validity of consent searches must be judged in terms of waiver and voluntarily consent).

278. Sylvia Moreno, *Race a Factor in Texas Stops: Study Finds Police More Likely to Pull Over Blacks, Latinos*, WASH. POST, Feb. 25, 2005, at A03.

279. The right to exclude evidence under Pennsylvania's Constitution is more expansive than the Fourth Amendment right. Commonwealth v. Valentin, 2000 PA Super. 63, ¶ 6, 748, A.2d 711, 713 (Pa. Super. Ct. 2000).

280. Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575, 576-77 (1989) (noting that Indiana's constitutional history indicates that the state's constitutional framers intended to entirely prohibit slavery (citing State v. Lasselle, 1 Blackf. 60, 62 (Ind. 1820)).

281. Litchfield v. State, 824 N.E.2d 356, 359 (Ind. 2005); *see* U.S. CONST. amend. IV; IND. CONST. art. 1, § 11.

282. Brown v. State, 653 N.E.2d 77, 80 (Ind. 1995); *see id.* at 80 n.3 (noting the need, in the Indianapolis 500's host state, "to recognize that cars are sources of pride, status, and identity").

law.[283] For consent searches, police must tell individuals in custody of their right to legal counsel before consent may be granted.[284]

States generally have not developed an independent consent search doctrine.[285] If a preponderance of the evidence demonstrates voluntary consent, state courts generally find that prosecutors have met state constitutional requirements.[286] But some states, such as Hawaii[287] and Oregon,[288] reject the rule that a person with mere apparent authority may consent.[289] In addition, Florida interpreted *Matlock* to mean that if two co-occupants are present, the express refusal of the other invalidates the search.[290] Wyoming and Delaware interpreted *Randolph* to bar the overriding of a refusal to consent.[291] Although the U.S. Supreme Court may end up favoring a narrower interpretation of *Randolph*, state high courts should find broader protections from government searches based on their state constitutions.[292] The personal consent approach provides state courts a framework to decide contested third-party consent searches.

CONCLUSION

Since President Nixon's law-and-order presidential campaign, criminal suspects have received little public sympathy.[293] Unfortunately, although crime

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283. *Litchfield*, 824 N.E.2d at 360-01 (finding that although the U.S. Constitution would not prohibit it, taking a suspected marijuana grower's trash could violate Indiana's Constitution).

284. Pirtle v. State, 323 N.E.2d 634, 640 (Ind. 1975).

285. 2 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES §§ 11.012, 11.01, 11.02 n.12 (4th ed. 2008) (noting that State restraints against government invasions of privacy are similar, but are generally independent from the U.S. Supreme Court "in result" rather in analysis).

286. *Id.* § 11.012.

287. *See* State v. Lopez, 896 P.2d 889, 903 (Haw. 1995) (holding that consenters must have actual authority).

288. State v. Ready, 939 P.2d 117, 120 n.4 (Or. 1997) (rejecting the apparent authority doctrine).

289. FRIESEN, *supra* note 285, § 11.012.

290. Lawton v. State, 320 So. 2d 463, 465 (Fl. Dist. Ct. App. 1975).

291. *See* McAllister, *supra* note 1, at 689-90 & nn.160-61 (citing McClelland v. State, 155 P.3d 1013, 1019 (Wyo. 2007); Donald v. State, 903 A.2d 315, 321 (Del. 2006)).

292. *See* Davis v. United States, 328 U.S. 582, 604 (1946) (Frankfurter, J., dissenting) (noting that all state constitutions limit government searches). See also *State v. Oliver*, No. SD28820, 2008 Mo. App. LEXIS 1756, at *22-23 (Mo. Ct. App. Dec. 16, 2008) (holding that when police waited for a suspect to leave before receiving the wife's consent, *Randolph* did not apply), *superseded by* SC89888, 2009 Mo. LEXIS 374 (2009), and *Payton v. Commonwealth*, No. 2007-CA-001379-MR, 2008 WL 5102130, at *5 (Ky. Ct. App. Dec. 5, 2008) (finding Payton failed to revoke a co-occupant's consent) for cases where states could institute a robust approach to contested third-party consent.

293. On the Media, *Beg Your Pardon?* (WNYC National Public Radio broadcast Dec. 19, 2008), *available at* http://www.onthemedia.org/transcripts/2008/12/19/05 (explaining how

still exists, all Americans, including law-abiding citizens, have lost constitutional liberties because of the Supreme Court's lax treatment of Fourth Amendment liberties, at least until *Randolph*. Kevin Henderson may not seem worthy of strong constitutional protections, but the Fourth Amendment does not make exceptions for individuals suspected of committing crimes. The Court must lift the Fourth Amendment from its degraded status as "a mere script . . . rewritten and conformed to the convenience of law enforcement officials who cannot be burdened with obtaining a warrant prior to a search."[294]

The Court has yet to determine whether a co-occupant's consent to a warrantless search is valid when the non-consenter is absent. But *Randolph* opened the door for a substantive reasonableness standard for third-party consent searches. The Court should use cases such as Kevin Henderson's to revitalize the liberties the Founders intended to protect by adopting the Fourth Amendment. State high courts should do the same. The personal consent approach for determining the constitutionality of third-party consent searches provides substantive Fourth Amendment liberties without placing an unreasonable burden on police. This country's judges "must have heard of the Fourth Amendment" by now because what this Note is saying in proposing to protect the Kevin Hendersons of the world is that "that man had rights."[295]

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presidential pardons act as a "safety valve" against criminal law's rigidity).

294. Kloster, *supra* note 39, at 122.

295. A memorable quote from the 1971 Don Siegel movie "Dirty Harry" starring Clint Eastwood. Here, District Attorney William T. Rothko (Josef Sommer) rebukes Police Inspector Harry Callahan (Eastwood) for his conduct during an arrest:

> Rothko: You're lucky I'm not indicting you for assault with intent to commit murder.
>
> Callahan: What?
>
> Rothko: Where the hell does it say that you've got a right to kick down doors, torture suspects, deny medical attention and legal counsel? Where have you been? Does *Escobedo* ring a bell? *Miranda*? I mean, you must have heard of the Fourth Amendment. What I'm saying is that man had rights.
>
> Callahan: Well, I'm all broken up over that man's rights!

DIRTY HARRY (Warner Bros. 1971).